NAVAL WAR COLLEGE

International Law Situations

WITH SOLUTIONS AND NOTES

1932

NAVAL WAR COLLEGE

International Law Situations

WITH SOLUTIONS AND NOTES

1932

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1934

For sale by the Superintendent of Documents, Washington, D.C. - - - Price 75 cents (cloth)

PREFACE

This annual volume of international-law topics has been compiled, as formerly, by George Grafton Wilson, LL.D., professor of international law at Harvard University. It covers the situations and discussions by the War College class of 1933 upon the interesting and timely questions of the weakness of local authorities in enforcing neutrality; the maritime jurisdiction around lighthouses; and that subject which came up at the time of the recent Sino-Japanese dispute-boycott. While the conclusions reached in these discussions are not authoritative in any way, they are of especial interest to naval officers as well as to students of international law.

In order to increase the usefulness of this publication, criticism and suggestions covering timely topics for discussion will be welcomed by the War College.

L. McNAMEE,
Rear Admiral, U.S. Navy,
President Naval War College.

SEPTEMBER 11, 1933.

CONTENTS

SITUATION I

BELLIGERENTS IN NEUTRAL WATERS

States X and Y are at war. Other states are neutral. There is a condition of political turmoil in state B, and the local authorities are weak and incapable of enforcing order within the territory of B.

(*a*) A cruiser of X, the *Xane*, pursues a merchant vessel of Y, the *Young*, into a port of B. What action may it take there?

(*b*) What action might be taken if the pursued vessel were a vessel of war of state Y, the *Yarrow?*

(*c*) What action should the *Xane* take if it learns that a radio station belonging to state B is transmitting military messages for the *Yarrow?*

SOLUTION

(*a*) The *Xane* should take no action against the *Young* merely because the *Young* has entered the port of B. In case the *Xane* is convinced that the *Young* is abusing its privileges in B because of the weakness of the local authorities, the *Xane* may visit and search the *Young* as a basis for determining subsequent action.

(*b*) If the *Yarrow* remains in port more than 24 hours, unless for the lawful taking on of coal or supplies or making repairs to render the ship seaworthy, the commander of the *Xane* may request the authorities of state B to intern the *Yarrow.*

(*c*) The commander of the *Xane* should protest against military use of radio; and if no competent local authority is present, should take such measures as may be least arbitrary to prevent its use.

NOTES

Belligerents in neutral jurisdiction.—In general the action of belligerents within neutral jurisdiction has year by year become more and more restricted. New and varied conditions, new instruments and agencies of warfare, and other changes have given rise to problems for which conventions and regulations have endeavored to provide.

It is now generally admitted that a neutral should not permit its territory to be used as a base by a belligerent, but it is not always clear as to what constitutes such use and illustrations of this fact may be found in practically every modern war.

As a state is, in consequence of the allegiance of its subjects, under a degree of responsibility for their acts, these acts therefore must be supervised within and to a degree outside its jurisdiction.

Early American attitude.—The United States was early confronted with conditions which required that the position of the Government be defined. The acts of M. Genet made some declaration of policy necessary. Washington issued a proclamation on April 22, 1793, stating that,

> Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands, of the one part, and France on the other; and the duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers:
>
> I have therefore thought fit by these presents to declare the disposition of the United States to observe the conduct aforesaid towards those Powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition:
>
> And I do hereby also make known, that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said Powers, or by carrying to any of them those articles which are deemed contra-

band by the *modern usage* of nations, will not receive the protection of the United States against such punishment or forfeiture; and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the Powers at war, or any of them. (1 Amer. State Papers, For. Rel., p. 140.)

This proclamation showed a disposition to keep the conduct of citizens of the United States clearly within what was at that time the unquestioned boundaries of proper neutral conduct. The action of belligerents within American jurisdiction gave rise to controversy and the Cabinet drew up a set of regulations in August 1793, as follows:

RULES ADOPTED BY THE CABINET AS TO THE EQUIPMENT OF VESSELS IN THE PORTS OF THE UNITED STATES BY BELLIGERENT POWERS, AND PROCEEDINGS ON THE CONDUCT OF THE FRENCH MINISTER.

AUGUST 3D, 1793.

1. The original arming and equipping of vessels in the ports of the United States by any of the belligerent parties for military service offensive or defensive is deemed unlawful.

2. Equipments of merchant vessels by either of the belligerent parties, in the ports of the United States, purely for the accommodation of them as such, is deemed lawful.

3. Equipments, in the ports of the United States, of vessels of war in the immediate service of the government of any of the belligerent parties, which, if done to other vessels, would be of a doubtful nature, as being applicable either to commerce or war, are deemed lawful; except those which shall have made prize of the subjects, people, or property of France, coming with their prizes into the ports of the United States, pursuant to the seventeenth article of our treaty of amity and commerce with France.

4. Equipments in the ports of the United States, by any of the parties at war with France, of vessels fitted for merchandise and war, whether with or without commissions, which are doubtful in their nature, as being applicable either to commerce or war, are deemed lawful, except those which shall be made prize, &c.

5. Equipments of any of the vessels of France in the ports of the United States, which are doubtful in their nature, as being applicable to commerce or war, are deemed lawful.

6. Equipments of every kind in the ports of the United States, of privateers of the powers at war with France, are deemed lawful [unlawful].

7. Equipments of vessels in the ports of the United States, which are of a nature solely adapted to war, are deemed unlawful; except those stranded or wrecked, as mentioned in the eighteenth article of our treaty with France, the sixteenth of our treaty with the United Netherlands, the ninth of our treaty with Prussia; and except those mentioned in the nineteenth article of our treaty with France, the seventeenth of our treaty with the United Netherlands, the eighteenth of our treaty with Prussia.

8. Vessels of either of the parties not armed, or armed previous to their coming into the ports of the United States, which shall not have infringed any of the foregoing rules, may lawfully engage or enlist their own subjects or citizens, not being inhabitants of the United States; except privateers of the powers at war with France, and except those vessels which shall have made prize, &c.

The foregoing rules having been considered by us at several meetings, and being now unanimously approved, they are submitted to the President of the United States.

THOMAS JEFFERSON.
ALEXANDER HAMILTON.
HENRY KNOX.
EDMUND RANDOLPH.

(7 Moore, International Law Digest, p. 891.)

Randolph, Secretary of State, in April 1795 sent to the Government of the several states the following circular instructions:

As it is contrary to the law of nations that any of the belligerent powers should commit hostility on the waters which are subject to the exclusive jurisdiction of the United States, so ought not the ships of war, belonging to any belligerent power, to take a *station in those waters in order to carry on hostile expeditions from thence.* I do myself the honor, therefore, of requesting of your excellency, in the name of the President of the United States, that, as often as a fleet, squadron, or ship, of any belligerent nation, shall clearly and unequivocally use the rivers, or other waters of _____ *as a station, in order to carry on hostile expeditions from thence*, you will cause to be notified to the commander thereof that the President deems such conduct to be contrary to the rights of our neutrality; and that a demand of retribution will be urged upon their government for prizes which may be made in consequence thereof. A standing order to this effect may probably be advantageously placed in the hands

of some confidential officer of the militia, and I must entreat you to instruct him to write by the mail to this Department, immediately upon the happening of any case of the kind. (Ibid., 934.)

This circular he subsequently explained did—

not request that vessels, using our waters as a hostile *station* should be ordered to depart—

but—

only that notice should be given to them of our intended demand upon their Government. An order to depart would be inconsistent with the letter of the 9th of Sept. 1793, which concedes to them our ports as a refuge in case of necessity and a resort for comfort or convenience, without limiting the time of their stay. (Ibid., 935.)

Essential idea of base.—The essential idea in base seems to be a place supporting the military force of the belligerent. The support may be of varying character. It may be a place from which fuel is drawn, a place to which retreat may be made for security, a place in which repairs may be made, etc. There would seem therefore to be a reason for the consideration of the question as to when a neutral port may be said to become a base. By the generally accepted law of war and neutrality, vessels of war of a belligerent may take a specified amount of coal at certain intervals within neutral jurisdiction, repairs to a limited extent may be allowed, sojourn for a period is permitted, etc. To furnish fuel to belligerent vessels of war, to allow repairs, to permit sojourn beyond the prescribed limits, may render the neutral open to charges of nonfulfillment of neutral obligations.

The neutral by modern regulations is under obligations to use "due diligence" or "the means at its disposal to prevent" violations of its neutrality by vessels of war and such use of force may not be considered unfriendly.

Essential idea of base as regards private vessels.—Private vessels in the time of war as in the time of peace are generally free to enter and to use neutral ports. A private vessel may, however, be subject to the control of a belligerent that it may not, in an exceptional case, use a

neutral port in such manner as to constitute the port a base.

Presumption as to base.—The presumption would naturally be that a vessel of war of a belligerent would, if unrestrained, use a neutral port as a base. The presumption would be that a private vessel entering a neutral port would be entering for innocent purposes.

The obligation of the neutral state would arise immediately on the entrance of a vessel of war of a belligerent to guard against the use of the port as a base.

The obligation as to a private vessel would arise only when there was reasonable evidence of such use.

There is, therefore, a good ground for difference in the regulations as to private and other ships.

Protection afforded by neutral jurisdiction.—Within neutral jurisdiction no act of war should take place. Here, therefore, a belligerent vessel is more safe than on the high sea or within its own ports for in either of these areas the belligerent vessel may be attacked. The natural consequence is that the belligerents desire to make such use of neutral waters as is permitted. The neutral state, in order to maintain neutrality, is obliged to make known the rules of conduct which it proposes to follow. There have been so many changes in the method of warfare that early rules may not be sufficiently detailed to cover new conditions. The idea of the use of an area within neutral jurisdiction as a base has gradually developed, though there is not an agreement as to what constitutes a base.

Case of the "Alabama."—The idea of "base of operations" as set forth in The Hague Convention of 1907 was influenced by the statement set forth in the second rule of the Treaty of Washington of 1871, relating to the *Alabama* claims. These rules provide that a neutral government is bound—

> First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry

on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as a base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties. [1 Moore, International Arbitrations, p. 550.]

It was admitted in the case for the United States that the sale of arms or of military supplies in the way of ordinary commerce was not prohibited, but the use of a neutral port should not be allowed for a belligerent "for the renewal or augmentation of such military supplies or arms for the naval operations referred to in the rule."

The case further stated that,

The ports or waters of the neutral are not to be made the base of naval operations by a belligerent. Vessels of war may come and go under such rules and regulations as the neutral may prescribe; food and the ordinary stores and supplies of a ship not of a warlike character may be furnished without question, in quantities necessary for immediate wants; the moderate hospitalities which do not infringe upon impartiality may be extended, but no act shall be done to make the neutral port a base of operations. Ammunition and military stores for cruisers cannot be obtained there; coal cannot be stored there for successive supplies to the same vessel, nor can it be furnished or obtained in such supplies; prizes cannot be brought there for condemnation. The repairs that humanity demands can be given, but no repairs should add to the strength or efficiency of a vessel beyond what is absolutely necessary to gain the nearest of its own ports. In the same sense are to be taken the clauses relating to the renewal or augmentation of military supplies or arms and the recruitment of men. As the vessel enters the port, so is she to leave it, without addition to her effective power of doing injury to the other belligerent. If her magazine is supplied with powder, shot, or shells; if new guns are added to her armament; if pistols, or muskets, or cutlasses, or other implements of destruction are put on board; if men are recruited; even if, in these days when steam

is a power, an excessive supply of coal is put into her bunkers, the neutral will have failed in the performance of its duty. [Ibid., p. 574.]

The United States enumerated the certain rules which it claimed were established:

1. That it is the duty of a neutral to preserve strict and impartial neutrality as to both belligerents during hostilities.

2. That this obligation is independent of municipal law.

3. That a neutral is bound to enforce its municipal laws and its executive proclamations; and that a belligerent has the right to ask it to do so; and also the right to ask to have the powers conferred upon the neutral by law increased if found insufficient.

4. That a neutral is bound to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace.

5. That a neutral is bound to use like diligence to prevent the construction of such a vessel.

6. That a neutral is bound to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war against any power with which it is at peace, such vessel having been specially adapted, in whole or in part, within its jurisdiction to warlike use.

7. That a neutral may not permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other.

8. That a neutral is bound to use due diligence in its ports or waters to prevent either belligerent from obtaining there a renewal or augmentation of military supplies, or arms for belligerent vessels, or the recruitment of men.

9. That when a neutral fails to use all the means in its power to prevent a breach of the neutrality of its soil or waters, in any of the foregoing respects, the neutral should make compensation for the injury resulting therefrom.

10. That this obligation is not discharged or arrested by the change of the offending vessel into a public man-of-war.

11. That this obligation is not discharged by a fraudulent attempt of the offending vessel to evade the provisions of a local municipal law.

12. That the offense will not be deposited so as to release the liability of the neutral, even by the entry of the offending vessel into a port of the belligerent, and there becoming a man-of-war, if any part of the original fraud continues to hang about the vessel. [Ibid., p. 579.]

The general propositions laid down in the British case are also very suggestive and may be cited in full:

1. A neutral government is bound to exercise due diligence, to the intent that no place within its territory be made use of by either belligerent as a base or point of departure for a military or naval expedition, or for hostilities by land or sea.

2. A neutral government is not, by force of the above-mentioned obligation or otherwise, bound to prevent or restrain the sale within its territory, to a belligerent, of articles contraband of war, or the manufacture within its territory of such articles to the order of a belligerent, or the delivery thereof within its territory to a belligerent purchaser, or the exportation of such articles from its territory for sale to, or for the use of, a belligerent.

3. Nor is a neutral government bound, by force of the above-mentioned obligation or otherwise, to prohibit or prevent vessels of war in the service of a belligerent from entering or remaining in its ports or waters, or from purchasing provisions, coal, or other supplies, or undergoing repairs therein; provided that the same facilities be accorded to both belligerents indifferently; and provided also that such vessels be not permitted to augment their military force, or increase or renew their supplies of arms or munitions of war, or of men, within the neutral territory.

4. The unlawful equipment, or augmentation of force, of a belligerent vessel within neutral waters being an offense against the neutral power, it is the right of the neutral power to release prizes taken by means or by the aid of such equipment or augmentation of force, if found within its jurisdiction.

5. It has been the practice of maritime powers, when at war, to treat as contraband of war vessels specially adapted for warlike use and found at sea under a neutral flag in course of transportation to a place possessed or occupied by a belligerent. Such vessels have been held liable to capture and condemnation as contraband on proof in each case that the destination of the ship was an enemy's port, and provided there were reasonable grounds for believing that she was intended to be sold or delivered to or for the use of the enemy.

6. Public ships of war in the service of a belligerent entering the ports or waters of a neutral are, by the practice of nations, exempt from the jurisdiction of a neutral power. To withdraw or refuse to recognize this exemption without previous notice, or without such notice to exert, or attempt to exert, jurisdiction over any such vessel, would be a violation of a common understanding, which all nations are bound by good faith to respect.

7. A vessel becomes a public ship of war by being armed and commissioned—that is to say, formally invested by order or under the authority of a government with the character of a ship employed in its naval service and forming part of its marine for purposes of war. There are no general rules which prescribe how, where, or in what form the commissioning must be effected so as to impress on the vessel the character of a public ship of war. What is essential is that the appointment of a designated officer to the charge and command of a ship likewise designated be made by the government, or the proper department of it, or under authority delegated by the government or department, and that the charge and command of the ship be taken by the officer so appointed. Customarily a ship is held to be commissioned when a commissioned officer appointed to her has gone on board of her and hoisted the colors appropriated to the military marine. A neutral power may indeed refuse to admit into its own ports or waters as a public ship of war any belligerent vessel not commissioned in a specified form or manner, as it may impose on such admission any other conditions at its pleasure, provided the refusal be applied to both belligerents indifferently; but this should not be done without reasonable notice.

8. The act of commissioning, by which a ship is invested with the character of a public ship of war, is, for that purpose, valid and conclusive, notwithstanding that the ship may have been at the time registered in a foreign country as a ship of that country, or may have been liable to process at the suit of a private claimant, or to arrest or forfeiture under the law of a private claimant, or to arrest or forfeiture under the law of a foreign state. The commissioning power, by commissioning her, incorporates her into its naval force; and by the same act which withdraws her from the operation of ordinary legal process assumes the responsibility for all existing claims which could otherwise have been enforced against her.

9. Due diligence on the part of a sovereign government signifies that measure of care which the government is under an international obligation to use for a given purpose. This measure, where it has not been defined by international usage or agreement, is to be deduced from the nature of the obligation itself, and from those considerations of justice, equity, and general expediency on which the law of nations is founded.

10. The measure of care which a government is bound to use in order to prevent within its jurisdiction certain classes of acts, from which harm might accrue to foreign states or their citizens, must always (unless specifically determined by usage or agreement) be dependent, more or less, on the surrounding circum-

stances, and can not be defined with precision in the form of a general rule. It would commonly, however, be unreasonable and impracticable to require that it should exceed that which the governments of civilized states are accustomed to employ in matters concerning their own security or that of their own citizens. That even this measure of obligation has not been recognized in practice might be clearly shown by reference to the laws in force in the principal countries of Europe and America. It would be enough, indeed, to refer to the history of some of these countries during recent periods for proof that great and enlightened states have not deemed themselves bound to exert the same vigilance and employ the same means of repression, when enterprises prepared within their own territories endangered the safety of neighboring states, as they would probably have exerted and employed had their own security been similarly imperiled.

In every country where the Executive is subject to the laws, foreign states have a right to expect—

(*a*) That the laws be such as in the exercise of ordinary foresight might reasonably be deemed adequate for the repression of all acts which the government is under an international obligation to repress.

(*b*) That, so far as may be necessary for this purpose, the laws be enforced and the legal powers of the government exercised.

But foreign states have not a right to require, where such laws exist, that the Executive should overstep them in a particular case in order to prevent harm to foreign states or their citizens; nor that, in order to prevent harm to foreign states or their citizens, the Executive should act against the persons or property of individuals, unless upon evidence which would justify it in so acting if the interests to be protected were its own or those of its own citizens. Nor are the laws or the mode of judicial or administrative procedure which exist in one country to be applied as constituting a rule or standard of comparison for any other country. Thus, the rules which exist in Great Britain as to the admission and probative force of various kinds of testimony, the evidence necessary to be produced in certain cases, the questions proper to be tried by a jury, the functions of the Executive in regard to the prevention and prosecution of offenses, may differ, as the organization of the magistrature and the distribution of authority among central and local officers also differ, from those which exist in France, Germany, or Italy. Each of these countries has a right, as well in matters which concern foreign states or their citizens as in other matters, to administer and enforce its own laws in its own forum, and according to its own rules and modes of procedure; and foreign states cannot

justly complain of this unless it can be clearly shown that these rules and modes of procedure conflict in any particular with natural justice, or, in other words, with principles commonly acknowledged by civilized nations to be of universal obligation.

In connection with the foregoing propositions are to be taken the three rules stated in Article VI. of the treaty, and accepted by Her Britannic Majesty's government in the manner expressed in that article." (Ibid. p. 599.)

The Institute of International Law, which in 1874 and in 1875 took into consideration the three rules of the Treaty of Washington of 1871, adopted in the meeting at The Hague in 1875 the following rules:

1. A neutral State which is desirous of remaining on terms of peace and friendship with the belligerents, and of enjoying the rights of neutrality, must abstain from taking any part whatever in the war, by lending military assistance to one or both of the belligerents, and exercise vigilance to prevent its territory from becoming a center of organization or point of departure for hostile expeditions against one or both of the belligerents.

2. Consequently the neutral State cannot, in any manner whatever, put at the disposal of any of the belligerent States, or sell to them, its war vessels or military transports, nor material from its arsenals or military stores, for the purpose of assisting it in prosecuting the war. Furthermore, the neutral State is bound to exercise vigilance to prevent other persons from placing war vessels at the disposal of any of the belligerent States in its ports or in those portions of the sea subject to its jurisdiction.

3. When the neutral State is aware of enterprises or acts of this kind, incompatible with neutrality, it is bound to take the necessary measures to prevent them, and to prosecute the individuals who violate the duties of neutrality, as the guilty parties.

4. Likewise, the neutral State should not permit nor suffer one of the belligerents to use its ports or waters as a naval base of operations against the other, or permit military transports to use its ports or waters to renew or add to their military supplies or arms, or to secure recruits.

5. The mere fact that a hostile act has been committed upon neutral territory is not sufficient to make the neutral State responsible. Before it can be admitted that it has violated its duty, it must be shown that there was a hostile intention (*dolus*), or manifest negligence (*culpa*).

6. Only in serious and urgent cases, and only during the existence of war, has the Power injured by a violation of neutral

duties the right to consider neutrality as abandoned and to resort to force to defend itself against the State which has violated neutrality.

In cases of a minor character, or where the matter is not urgent, or after the war is over, complaints of this character should be settled exclusively by arbitration.

7. The arbitral tribunal decides *ex æquo et bono* on the questions of damages which the neutral State should, by reason of its responsibility, pay to the injured State, either for the State itself, or for its nationals (*ressortissants*). (Resolutions of the Institute of International Law. Carnegie Endowment for International Peace, 1916, p. 12.)

Argument of Sir Roundell Palmer.—In the supplemental argument supporting the British case before the Geneva tribunal, Sir Roundell Palmer said of the expression "base of naval operations", after citing various authors:

The phrase now in question is a short expression of the principle that neutral territory is not to be used as a place from which operations of naval warfare are to be carried into effect: whether by single ships, or by ships combined in expeditions. It expresses an accepted rule of international law. Any jurist who might have been asked whether neutral ports or waters might be used as a base for naval operations, would have replied that they might not; and he would have understood the words in the sense stated above.

The above citations and references furnish at the same time the necessary limitations under which the phrase is to be understood. None of these writers question—no writer of authority has ever questioned—that a belligerent cruiser might lawfully enter a neutral port, remain there, supply herself with provisions and other necessities, repair damages sustained from wear and tear, or in battle, replace (if a sailing-ship) her sails and rigging, renew (if a steamer) her stock of fuel, or repair her engines, repair both her steaming and her sailing power, if capable (as almost all ships of war now are) of navigating under sail and under steam, and then issue forth to continue her cruise, or (like the *Alabama* at Cherbourg) to attack an enemy. "Ils y sont admis à s'y procurer les vivres nécessaires et à y faire les réparations indispensables pour reprendre la mer *et se livrer de nouveau aux opérations de la guerre;*" (Ortolan: Heffter.) "Puis sortir librement pour aller livrer de nouveaux combats;" (Hautefeuille.) The connection between the act done within the neutral terri-

tory and the hostile operation which is actually performed out of it, must (to be within the prohibition) be "proximate"; that is, they must be connected directly and immediately with one another. In a case where a cruiser uses a neutral port to lie in wait for an enemy, or as a station from whence she may seize upon passing ships, the connection is proximate. But where a cruiser has obtained provisions, sail-cloth, fuel, a new mast, or a new boiler-plate in the neutral port, the connection between this and any subsequent capture she may make, is not "proximate", but (in the words of Lord Stowell, quoted by Kent, Wheaton, and other writers) "remote." The latter transaction is "universally tolerated"; the other universally forbidden.

It is evident that if this phrase, "base of operations", were to be taken in the wide and loose sense now contended for by the United States, it might be made to comprehend almost every possible case in which a belligerent cruiser had taken advantage of the ordinary hospitalities of a neutral port. It would be in the power of any belligerent to extend it almost indefinitely, so as to fasten unexpected liabilities on the neutral. (Papers relating to Treaty of Washington, vol. 3, p. 434.)

Replies to Sir Roundell Palmer.—In the reply of Mr. Evarts to the argument of Sir Roundell Palmer, Mr. Evarts admits that ordinary dealings in contraband in the way of regular commerce is not prohibited. He adds, however,

> But whenever the neutral ports, places, and markets are really used as the bases of naval operations, when the circumstances show that resort and that relation and that direct and efficient contribution and that complicity and that origin and authorship, which exhibit the belligerent himself, drawing military supplies for the purpose of his naval operations from neutral ports, *that* is a use by a belligerent of neutral ports and waters as a base of his naval operations, and is prohibited by the second Rule of the Treaty. Undoubtedly the inculpation of a neutral for permitting this use turns upon the question whether due diligence has been used to prevent it.

The argument upon the other side is that the meaning of "the base of operations", as it has been understood in authorities relied upon by both nations, does not permit the resort to such neutral ports and waters for the purpose of specific hostile acts, but proceeds no further. The illustrative instances given by Lord Stowell or by Chancellor Kent in support of the rule are adduced as being the measure of the rule. These examples are of this

nature: A vessel cannot make an ambush for itself in neutral waters, cannot lie at the mouth of a neutral river to sally out to seize its prey, cannot lie within neutral waters and send its boats to make captures outside their limits. All these things are proscribed. But they are given as instances, not of *flagrant*, but of *incidental* and *limited* use. They are the cases that the commentators cite to show that even casual, temporary, and limited experiments of this kind are not allowed, and that they are followed by all the definite consequences of an offence to neutrality and of displeasure to a neutral, to wit, the resort by such neutral power to the necessary methods to punish and redress these violations of neutral territory. (Ibid., p. 460.)

Mr. Waite, replying to Sir Roundell Palmer's argument in regard to "base of operations", said:

It is not contended by the Counsel of the United States, that all supplies of coal in neutral ports to the ships of war of belligerents, are necessarily violations of neutrality, and, therefore, unlawful. It will be sufficient for the purposes of this controversy, if it shall be found that Great Britain *permitted* or *suffered* the insurgents "to make use of its ports or waters as the base of naval operations against the United States", and that the supplies of coal were obtained at such ports to facilitate belligerent operations.

1. All naval warfare must, of necessity, have upon land a "base of operations." To deprive a belligerent of that is equivalent to depriving him of the power to carry on such a warfare successfully for any great length of time. Without it he cannot maintain his ships upon the Ocean.

2. A "base of operations" for naval warfare is not alone, as seems to be contended by the distinguished Counsel of Great Britain, (sec. 3, chap. iii, of his argument,) "a place from which operations of naval warfare are to be carried into effect." It is not, of necessity, the place where the belligerent watches for, and from which he moves against, the enemy; but it is any place at which the necessary preparations for the warfare are made; any place from which ships, arms, ammunition, stores, equipment, or men are furnished, and to which the ships of the navy look for warlike supplies and for the means of effecting the necessary repairs. It is, in short, what its name implies—the support, the foundation, which upholds and sustains the operations of a naval war. (Ibid., p. 513.)

Opinion of Hall.—The opinion of Hall that "continued use is above all things the crucial test of a base"

can hardly be supported. Indeed, Hall's own position seems in some respects to be inconsistent with this doctrine. A somewhat extended quotation from Hall shows this:

An argument placed before the Tribunal of Arbitration at Geneva on behalf of the United States, though empty in the particular case to which it was applied, suggests that the essential elements of the definition of a base possess a wider scope than is usually given to them. In 1865 *The Shenandoah*, a Confederate cruiser, entered Melbourne in need of repairs, provisions, and coal, and with a crew insufficient for purposes of war. She was refitted and provisioned, and obtained a supply of coal, which seems to have enabled her to commit depredations in the neighbourhood of Cape Horn on whalers belonging to the United States, her crew having been surreptitiously recruited at the moment of her departure from Port Philip. It was urged on the part of the government of that country that "the main operation of the naval warfare" of *The Shenandoah* having been accomplished by means of the coaling "and other refitment", Melbourne had been converted into her base of operations. The argument was unsound because continued use is above all things the crucial test of a base, both as a matter of fact, and as fixing a neutral with responsibility for acts in themselves innocent or ambiguous. A neutral has no right to infer evil intent from a single innocent act performed by a belligerent armed force; but if he finds that it is repeated several times, and that it has always prepared the way for warlike operations, he may fairly be expected to assume that a like consequence is intended in all cases to follow, and he ought therefore to prevent its being done within his territory. If a belligerent vessel, belonging to a nation having no colonies, carries on hostilities in the Pacific by provisioning in a neutral port, and by returning again and again to it, or to other similar ports, without ever revisiting her own, the neutral country practically becomes the seat of magazines of stores, which though not warlike are necessary to the prolongation of the hostilities waged by the vessel. She obtains as solid an advantage as Russia in a war with France would derive from being allowed to march her troops across Germany. She is enabled to reach her enemy at a spot which would otherwise be unattainable. [An illustration of this is afforded by the voyage of the Russian Fleet, which quitted Libau on October 15, 1904, and was annihilated at the battle of the Tsu-shima, on May 26, 1905. During the whole of this period the squadrons both of Admiral Rohjestventsky, which went round

the Cape, and of the divisional commanders, who used the Suez Canal, were entirely cut off from their base; they never touched Russian territory from the hour they left the home waters, and they were entirely dependent for their supplies of coal and of fresh provisions upon what they could obtain on the way. A series of floating coal depots, indeed, had been laid down in advance, but the operation of coaling seems to have taken place more than once within territorial waters, and it is obvious that without a user of neutral ports, which is in conflict with the principles laid down above, the expedition could only have accomplished a small portion of its journey. The prolonged stay of the same fleet both at Madagascar and in French Cochin China is difficult to reconcile with the obligations of neutrality.[1]]

That previously to the American Civil War neutral states were not affected by liability for acts done by a belligerent to a further point than that above indicated, there can be no question; but there is equally little question that opinion has moved onwards since that time and the law can hardly be said to have remained in its then state. Even during the American Civil War ships of war were only permitted to be furnished with so much coal in English ports as might be sufficient to take them to the nearest port of their own country, and were not allowed to receive a second supply in the same or any other port, without special permission, until after the expiration of three months from the date of receiving such coal. The regulations of the United States in 1870 were similar; no second supply being permitted for three months unless the vessel requesting it had put into a European port in the interval.[2] When vessels were at the mercy of the winds it was not possible to measure with accuracy the supplies which might be furnished to them, and as blockades were seldom continuously effective, and the nations which carried on distant naval operations were all provided with colonies, questions could hardly spring from the use of foreign possessions as a source of supplies. Under the altered conditions of warfare matters are

[1 See Smith and Sibley, International Law, 460–2. By the Declaration of the Governor of Malta of August 1904, belligerent vessels proceeding to the seat of war, or to any positions on the line of route with the object of intercepting neutral vessels, were prohibited from making use of British territorial waters for the purpose of coaling. Vessels in distress were exempted. Similar instructions were sent to the Governors of the Colonies (The Times, 23d August 1904; Smith and Sibley, op. cit., 135).]

[2] Earl Russell to the Lords Commissioners of the Admiralty, January 31, 1862. State Papers, 1871, lxxi. 167. Among late writers, Ortolan (ii. 286), Bluntschii (§773), and Heffter (§149) simply register the existing rule. Calvo (§2674) expresses his approval of the English regulations.

changed. When supplies can be meted out in accordance with the necessities of the case, to permit more to be obtained than can, in a reasonably liberal sense of the word, be called necessary for reaching a place of safety, is to provide the belligerent with means of aggressive action; and consequently to violate the essential principles of neutrality. (Hall, International Law, 8th ed., p. 724.)

Westlake's opinion, 1907.—Writing in 1907 and taking into consideration The Hague Conventions, Westlake says in regard to the Rules of the Treaty of Washington, "Some doubt has been felt whether 'base of operations' in the second rule was not intended to refer to a base used for large or repeated operations, the departure of a single ship from a neutral port having been dealt with in the first rule. But the term 'base' does not in itself carry any implication as to the importance or number of the operations proceeding from it, and the principle is the same whether an expedition consists of a fleet or of a single ship. Nay, more, the principle is the same for expeditions starting from land or from sea frontiers. The departure of a force from either with belligerent intent is a matter which in every country is reserved for the public authority, and any private person or foreign government which presumes to dispatch a force with such an intent usurps that authority, and involves the territorial government which permits such a usurpation in the charge of participating in the war. We are then entitled to omit the word 'naval' from the second *Alabama* rule, and to expand 'ports and waters' into 'territory.' We have it thus as a general rule that 'a neutral government is bound not to permit either belligerent to make use of its territory as the base of operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men'." (International Law, part II; War, p. 192.)

Opinion of Westlake, 1910.—Some writers upon the subject of what constitutes a base have endeavored to introduce the idea of habitual or repeated use as a neces-

sary prerequisite. Professor Westlake in 1910 referred to this idea,

L'interdiction de la transformation de ports neutres en bases d'opérations navales n'exclut pas seulement une série de pareilles opérations. Une seule peut être assez importante pour compromettre la neutralité d'un port qui en a été la base. Ainsi un Etat qui entend maintenir une neutralité impartiale ne jouit que d'un champ très restreint pour fixer à son gré la durée et les conditions du séjour des navires belligérants. Encore ce champ peut-il lui être plutôt nuisible. Il se peut qu'il veuille se réserver une certaine liberté de choix dans le matière, moins pour pouvoir substituer une neutralité bienveillante à une neutralité impartiale, que pour montrer aux deux parties de petites complaisances et éviter des explications fâcheuses avec l'une et l'autre également. Mais, même dans ce cas, l'Etat neutre ferait mieux d'aider à l'établissement de règles qu'il pourrait invoquer comme justifiant sa conduite. Leur existence empêcherait de se produire mainte plainte au sujet de laquelle, une fois produite, les explications pourraient être strictement suffisantes mais laisser fermenter une amertume dans les rapports subséquents des puissances en question. (23 Annuaire de l'Institut de Droit International, p. 132.)

Lawrence on base of operations.—The change of attitude upon the idea of "base of operations" is evident in the opinion of Dr. Lawrence as set forth in the earlier and later editions of his book Principles of International Law. Referring to Hall's statement that "continued use is above all things the crucial test of a base," Lawrence says:

and it is difficult to resist the arguments in favor of this view, which applies to a fleet or a single ship as well as to an army or a detachment of troops. The drawing of supplies once or twice from a given point in the course of long-continued hostilities will not make it into a base. Constant communication must be kept up with it, from it a stream of supplies must flow, and the way to it must be open for trains and convoys to pass and repass. General Sherman, in his march through Georgia in the autumn of 1864, was said to have cut himself off from his base, because for several weeks he was out of reach of communications from his own side, nor could he draw stores and reinforcements from any point in the possession of the Northern forces. The fact that he took provisions and forage from place after place passed by his army on its march did not make any of them into a base of operations, because the element of continuous use was wanting.

Now if we apply those considerations to assist us in determining the sense to be put upon the phrase when we find it in a rule of International Law, we shall be forced to the conclusion that a belligerent does not make neutral territory or a neutral port into a base of operations by obtaining in it once or twice, or at infrequent intervals, such things as provisions, coals and naval stores. It is true that there are some articles so directly useful for purposes of hostility that to take even a single supply of them is forbidden. But these restraints are imposed by the law of nations directly and in so many words. They are not left to be derived by construction from an interpretation of general terms. Other matters must be referred to in the prohibition of the use of neutral territory as a base of operations. Undoubtedly it is aimed at the frequent drawing of stores and equipments from depots situated in neutral territory and always open to the belligerent for the replenishment of his magazines. Each separate supply may be innocent in itself, or at most of a doubtful nature. It is their constant recurrence which makes them illegal. (1895 edition, p. 504.)

In the 1910 edition of the same work Lawrence says:

" but it is difficult to resist the argument that, though continuous use does undoubtedly make a place from which supplies and reinforcements are drawn into a base, yet we cannot go so far as to say that without continuous use there can be no question of any violation of neutrality. It is quite possible, for instance, to conceive of a case where the admission into a neutral port of a warlike expedition for the purpose of refitment and coaling would enable it to strike a successful blow at some neighboring possession of the other belligerent. Surely in such circumstances the port would be a base of operations, even though the belligerent flag was seen in it on no other occasion during the war. The phrase we are considering is often used in connection with such matters as the supply of arms and ammunition, the recruitment of men, and the addition of equipments of war. But these things were prohibited definitely and directly long before the phrase was introduced, and it cannot be regarded as prohibiting them all over again indefinitely and indirectly. It is suggested that the words should be used to cover cases where acts which neutrals need not prohibit when done to a slight extent or for a short time, have taken place on such scale or for so long a time as to turn them into occurrences highly beneficial to the belligerent in pursuit of his warlike ends. For instance, a brief visit to a neutral port is quite allowable, but a lengthy stay for purposes of rest and refitment should be forbidden; or a prize may be taken in and kept for

a short period, but if the port is filled with prizes and they are left in safety there for an indefinite time, it should be regarded as a base of operations." 1910 edition (p. 618).

General responsibilities.—The responsibility for acts which are legitimate only in the time of war rests upon the belligerent who commits the act. The acts of war must be within the rules recognized as regulating the conduct of hostilities. For acts not conforming to these rules the one violating the rules assumes the responsibility. This principle is definitely announced in the first article of the Hague Convention concerning the Rights and Duties of Neutral Powers in Maritime War which states that "Belligerents are bound to respect the sovereign rights of neutral powers."

The responsibility for acts generally legitimate both in time of peace and in time of war is determined by the act and the conditions under which it occurs. Entrance of a belligerent vessel to a neutral port with the purpose of departing within the time fixed by the neutral state would be legitimate so far as the belligerent and neutral states are concerned and a sojourn for a longer period on account of stress of weather might be equally legitimate. Sojourn by a belligerent vessel for a period longer than that allowed and without such reason, if unknown to the neutral, would be a violation of neutrality and the responsibility would rest upon the belligerent. Such sojourn with the knowledge and consent of the neutral would transfer the responsibility to the neutral state.

For the commission of acts legitimate in the time of peace but not legitimate within neutral jurisdiction in time of war the neutral state is responsible so far as the manifest neglect of the neutral state to exercise "due diligence" makes the acts possible.

Privileges and obligations of belligerents.—The general practice of permitting ships of war of belligerents to enter neutral maritime jurisdiction gives to the vessels certain privileges. The permission to enter would

be an empty one if the vessel should be necessarily in a less favorable condition on departure than before entrance, i.e., if a vessel enters and is allowed to purchase no supplies whatever the stock would be depleted by the amount consumed during the sojourn. The privilege of entrance would seem reasonably to carry with it the privilege of maintaining the vessel in a state of general efficiency at least equal to that existing at the time of entrance. On the grounds of humanity and in accordance with precedents, still further privileges have ordinarily been afforded. These have varied at different times and in different states. The privileges granted must not be such as to involve participation in the hostilities for this would violate the accepted principles of lawful neutral conduct.

The belligerent is under obligation in turn to respect the neutral jurisdiction. As the neutral state admits the belligerent vessel as a privilege, the belligerent should avoid acts which would partake of the nature of hostilities or be in disregard of the regulations of the neutral.

Duty of belligerents.—The Hague Convention XIII, concerning the Rights and Duties of Neutral Powers in Maritime War places the primary obligation upon the belligerent. In article I is the following statement:

> Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from all acts which would constitute, on the part of the neutral Powers which knowingly permitted them, a non-fulfilment of their neutrality.

This position sustains the contention that the burden of war should so far as possible be borne by the belligerent. The need for regulations had been seen in the diversity of practice in recent wars. The form of article I follows closely the draft of the proposition originally submitted by Great Britain.

Admission of private vessels.—The admission of private vessels is generally without restriction, save necessary port regulations. The admission of a private vessel is usually assumed to be of advantage to the state receiving the vessel and to the vessel. The right of entrance subject to necessary port regulations may be said to be admitted in the family of nations. The private vessel would be subject to such restrictions as may be established; otherwise the vessels would be unrestrained. These restrictions might be somewhat more numerous in time of war than in time of peace, but, in general, to private vessels acts not prohibited may be regarded as allowed.

Exclusion of vessels of war.—The admission of a belligerent vessel of war to a neutral port or waters is, in general, not for the benefit of the neutral state. It is now usual for a neutral state to prescribe the conditions of admission and of sojourn. In some instances belligerent ships of war are excluded as in the case of the Netherlands proclamation of July 30, 1914:

> Article 2. As long as the Order mentioned in Article I (Royal Order of October 30, 1909) is not in force, it is forbidden to war ships or similar vessels of foreign powers to enter the Netherlands territorial waters from the sea or to remain therein.

Other states have made regulations varying in character. Nearly all states assume the right to exclude foreign vessels of war from certain maritime areas and to regulate the action of foreign vessels of war in all areas.

The acts which may be allowed to a belligerent vessel of war within neutral jurisdiction are usually enumerated and acts not permitted are generally regarded as prohibited.

As the basis of regulation of the admission and conduct of private vessels and vessels of war differs, the regulations would naturally differ. The regulations for the admission of vessels of war are now regarded as proceeding from a generally accepted right of absolute

prohibition. To endeavor to make the regulations for both classes of vessels the same would lead to unnecessary confusion.

Enumeration of acts which should be prohibited to belligerent vessels would be manifestly impossible as these will vary.

The general principle is that action friendly and not involving participation in war will be allowed and that the burden of the war should not be unnecessarily thrown upon the neutral. A neutral state is not obliged by the existence of war between two states with which it is on terms of friendship to break off relations with those states but merely to refrain from participation in the contest by aiding one against the other. As regards maritime relations aid would be afforded if the neutral acted in such manner as to increase the fighting efficiency of either belligerent or if it allowed either belligerent to use the protection of the neutral jurisdiction to this end. A neutral state is under no obligation to endeavor to prevent acts within its jurisdiction which if having any relation at all to hostilities is only remote, e.g., innocent passage through its waters. On the other hand the obligation is clear where relation to the hostilities is proximate, e.g., fitting out and arming a vessel. Action other than permitted within neutral jurisdiction would constitute a violation or neglect to fulfill the obligations of neutrality. If committed by the belligerent without the knowledge of or in a manner beyond the control of the neutral, the responsibility would rest primarily upon the belligerent. If committed with the knowledge of and within the power of control of the neutral, there would be a nonfulfillment of neutral obligations and the responsibility would rest on the neutral state.

Ideas of neutral base.—Article 5 of the Hague Convention concerning the Rights and Duties of Neutral Powers in Maritime War forbids belligerents the use of neutral ports or waters as a base of naval operations,

against their adversaries. This same article specifies one particular use, viz, the erection of radio stations or any apparatus for the purpose of communication with belligerent forces on land or sea. Article 8 places the neutral government under obligation to prevent the fitting out or arming of any vessel designed to carry on war against a state with which the neutral state is at peace. Article 12 provides against long sojourn of belligerent ships in neutral ports. Article 17 limits repairs to belligerent ships of war to those necessary to render the ships seaworthy. Article 19 forbids the use of neutral waters for replenishing or increasing war material, armament or crews. Limitations upon supplies of food and fuel are imposed in article 19, and article 20 provides as to the frequency of taking such supplies. Article 25 provides for the enforcement of these rights of a neutral state by "the means at its disposal." Such acts as those above mentioned have been named by some as constituting neutral waters as a base.

The opinion has been frequently expressed that *repeated* use is necessary to constitute a place within neutral jurisdiction a base of operations.

This opinion is expressed by certain of the writers on international law particularly during the last quarter of the nineteenth century. It also appears in some state regulations.

Base in neutral jurisdiction, definition.—Often the idea has been expressed that it is necessary that the use of a neutral port or waters be repeated use in order to constitute a base. It is evident that frequent or repeated use would be one of the clearest evidences of the use of a port as a base. A single use of a port might, however, constitute the port a base provided this use were in excess of or in contravention of permitted use. It is now generally admitted that a belligerent is bound not to use neutral waters except as permitted and that the neutral state is bound to use the means at its disposal.

to prevent such unpermitted use. These general rules indicate the principle which underlies the idea of base, viz, use beyond that permitted to the belligerent and giving rise to an obligation on the part of the neutral state to use the force at his disposal to prevent. It is not for the belligerent to judge what should be permitted; it is the duty of the belligerent to refrain from acts which are not permitted by the laws and proclamations of neutrality. It may be said that in time of war the use of neutral ports or waters other than permitted by laws and proclamations constitutes such ports or waters a base.

A base within neutral jurisdiction is therefore a place which is used by a belligerent in a manner not permitted by law.

Franco-Prussian War, 1870.—There was much uncertainty in 1870 in regard to the proper regulation of neutral conduct. The arbitral award in the *Alabama* case later threw some light upon certain points in regard to neutral obligation. The proclamation issued by President Grant in October 1870 was quite comprehensive and has been the basis of subsequent proclamations. (For full text see International Law Situations, 1904, p. 68.) The reasons why this proclamation was so definite in regard to the use of American ports and waters may in part be seen from the letter of the British Minister of October 10, 1870.

WASHINGTON, *Oct. 10, 1870.*

MY LORD: I have the honour to inclose a copy of a Proclamation which was signed by the President of the United States on the 8th instant, and published yesterday, as to the manner in which, with reference to the war now existing between France and the North German Confederation and its allies, the armed vessels of either belligerent, whether public ships or privateers, are to be treated in the ports of the United States. The contents of this Proclamation are in many respects similar to the orders recently given by Her Majesty's Government with respect to the treatment of such vessels in British ports.

It would seem that the issue of this document has been instigated by the recent conduct of French vessels of war in the neigh-

bourhood of the port of New York. It is said that French gunboats have lately moored about the entrance of that port, and have sometimes been anchored outside, within three miles of the coast, for the purpose of intercepting any North German vessels which might leave New York, and particularly the German steamers, which, in consequence of the termination of the blockade of the German ports, have renewed their voyages. On one occasion the French gunboat "Latouche Tréville" steamed up the Bay of New York, round the steamer "Hermann", went out again, and anchored outside.

A French frigate and two smaller vessels of war arrived lately at New London in Connecticut, on the pretext of requiring repairs; they remained there for some days, although they only had to repair some spars, which could have been done nearly as well at sea as on shore. From that point notice could be given of the sailing of German vessels from New York, and men-of-war stationed at New London could easily have intercepted them.

Mr. Fish told me that he had represented to the French Minister that, although he could not positively allege a violation of international law, he considered that the proceedings of belligerent vessels of war in hovering about the entrance of a neutral port, and, as it were, blockading it, and making the neighbourhood a station for their observations, were contrary to custom, and were unfriendly and uncourteous to the United States. Mr. Fish added that M. Berthémy had written upon the subject to the French Admiral, who, in reply, had denied the fact of hovering about the port, or of using the neighbourhood as a station of observation; but confessed that the proceeding of the "Latouche Tréville" in entering the port of New York for the purpose of observing the steamer "Hermann" was improper, and that her commander had consequently been severely reproved.

My Prussian colleague, in expressing his satisfaction at the issue of the inclosed Proclamation, has made observations which lead me to suppose that he imagines that by its provisions merchantships are prohibited from exporting arms and ammunition from the ports of the United States for the use of the belligerents, and I fear that he may have telegraphed in that sense to his Government; but though I did not feel called upon to question Baron Gerolt's view of the case, I can find no expressions in the Proclamation to justify such an interpretation; indeed, Mr. Fish denies that it was intended to convey any such meaning.

I have, etc.

EDW. THORNTON.

(Das Staatsarchiv. vol. 20, p. 351.)

Secretary Fish, in a letter to Minister Washburne at Paris, said:

DEPARTMENT OF STATE,
Washington, October 4, 1870.

This Government desires and intends to maintain a perfect and strict neutrality between the two powers now unfortunately engaged in war. It desires also to extend to both the manifestation of its friendly feeling in every possible way, and will allow to the vessels of war of each power, equally, the hospitality of its ports and harbors for all proper and friendly purposes.

But this hospitality is liable to abuse, and circumstances have arisen to give rise in the minds of some persons to the apprehension that attempts at such abuse have taken place.

I am not in possession of facts to justify me in saying that such has been the case, but I have deemed myself justified in calling the attention of M. Berthémy, the French representative at this capital, to the current rumors, sustained as they are by the presence of a number of French vessels upon the coast of the United States. These vessels have appeared at or near the entrance of the harbor of New York, off Sandy Hook; at the entrance of the Long Island Sound; at or near the entrance of the Chesapeake Bay. One or more is represented to have been anchored not far from Sandy Hook (the main entrance to New York Harbor,) and there is a difference of statement as to the precise distance at which she lay from the shore; some claiming that she was within a marine league. But of this there is no positive evidence. She has entered the port of New York (as claimed by some) for the purpose of watching a German steamer about to sail thence. Three of them have put into the harbor of New London (which looks out upon Long Island Sound, the eastern entrance to the New York Harbor) avowedly for some small repairs; one recently asked permission, which was granted, to make some repairs at the Norfolk navy yard, near the entrance of Chesapeake Bay.

All this may be consistent with an intention of perfect observance of the neutral character of our waters and jurisdiction, and with an entire absence of undertaking any hostile movement against the vessels of North Germany, from those waters, or that jurisdiction.

A large trade has been carried on from the ports of the United States, approached by the waters in which these vessels have thus appeared, by vessels belonging to North Germany.

The appearance of French vessels in these immediate neighborhoods, in such numbers and force, does not fail to excite the

alarm of these vessels, and must have the effect to a greater or less degree to diminish that trade.

The United States are not prepared at present to say that any actual violation of international law has been committed, or that the hospitality of these waters has been positively abused. But the hovering of the vessels of war of a belligerent on the coasts near the entrance of the principal ports of a friendly power does interfere with the trade of the friendly power.

The interruption of the regular communication with you, by reason of the investment of Paris, has led me to represent to M. Berthémy our views on this subject, and to say that, although the vessels of either belligerents may not actually shelter within the jurisdiction of the United States and proceed thence against the vessels of its enemy, this Government would regard as an unfriendly act the hovering of such vessels upon the coast of the United States, near to its shores, in the neighborhood of its ports, and in the track of the ordinary commerce of these ports, with intent to intercept the vessels of trade of its enemy.

I have requested M. Berthémy to make known these views to the French government, and to express the confident hope of the President that there may be no cause of complaint on the part of this Government by reason of any such hovering by the vessels of the French government.

You will be pleased to take an early opportunity to present the same view to the minister for foreign affairs, which you may do by reading to him this dispatch.

HAMILTON FISH.

(1870, Foreign Relations. U. S., p. 70.)

Japanese neutrality, 1870.—The fact that there were special privileges accorded to certain European powers in the maintenance of ships of war in Japanese waters for protection of Europeans in the years before 1870 gave rise to complications on the outbreak of war. Japan issued a proclamation of neutrality, as follows:

PROCLAMATION OF NEUTRALITY.

Information having been received that war has broken out between Prussia and France, his Majesty the Emperor has declared his resolve to maintain strict neutrality, and he has therefore directed that the following regulations shall be made known, not only at the open ports, but also at all towns on the sea-coast, so as to prevent untoward consequences.

ARTICLE I. The contending parties are not permitted to engage in hostilities in Japanese harbors or inland waters, or within a distance of three ri from land at any place, such being the distance to which a cannon ball can be thrown. Men-of-war or merchant vessels will, however, be allowed free passage as heretofore.

ARTICLE II. Any vessel belonging to either of the contending parties, whether men-of-war or merchant vessels, shall be impartially supplied with wood, water, and provisions at the open ports, or other sea-ports of Japan in the same way as notified before, and shall receive assistance in case of distress.

ARTICLE III. If ships of war belonging to both parties shall enter the same port, the ship belonging to one party will not be allowed to sail until twenty-four hours after the departure of the other.

ARTICLE IV. Some countries have troops stationed at one of the open ports, their men-of-war are allowed to anchor there, and a marine camp has been formed; but this permission has been granted solely for the ordinary protection of their subjects resident at the port in question, and not for any purpose connected with foreign wars. These quarters must not be used in furtherance of any expedition against the enemy, and unconnected with their ordinary use.

ARTICLE V. Japanese vessels are prohibited from carrying troops, arms, or munitions of war for the service of either of the hostile parties.

ARTICLE VI. All persons, with the exception of pilots, who shall take service on board of ships of war of either of the contending parties, will do so at their own risk and peril.

ARTICLE VII. The sale of prizes in a Japanese harbor is prohibited. In case, however, it should become necessary to dispose of a prize in a Japanese harbor, permission should be applied for, and question decided in consultation with the diplomatic representative of the nation to which the captor belongs.

ARTICLE VIII. With regard to other articles of import and export the same rules are to be observed as hitherto.

ARTICLE IX. In case any of the provisions of the above regulations which relate to foreigners should be infringed, steps should be taken to put a stop to such acts by application to the consul of the party concerned, if committed at the open ports. If representations to the consul are of no effect, application should be made to the Japanese men-of-war stationed there to take the necessary steps. If a breach of these regulations be committed at a non-treaty port, the local authorities should inform the authorities at the nearest open port, and also the Japanese men-of-war. In the case of remote places, notice should be sent direct to the war and foreign offices.

The above regulations must be carefully attended to by the authorities of the open ports, and of the seaboard Fu, Han, and Ken.

DAJOKWAN.

AUGUST, 1870.

(1870, Foreign Relations, U.S., p. 188.)

Practice of intervention.—During the period before 1830 there had been in general a favorable attitude toward intervention in affairs of weak states, and the more powerful states had found no difficulty in persuading themselves of the necessity for "interfering," "intermeddling," or intervening in the affairs of weaker states.

During the last 100 years there has been a growing opinion favorable to nonintervention, though Gericke (*De jure interventionis*), in 1834, looking back upon the period of 45 years since the French Revolution found ample examples supporting the view that intervention was the normal conduct in international relations.

There have been many interventions since 1834 in many parts of the world. The United States has frequently intervened for varying reasons, and in a single year in countries in the Mediterranean, South America, and the Pacific Ocean. Revolutions in less advanced states have been numerous and have made it necessary that the more powerful states protect their own citizens at least. The grounds of intervention have ranged from self-protection to so-called "treaty obligations."

Early doctrines of intervention are being revived by modern propositions in regard to the maintenance of world peace. States outside a dispute are presuming to determine in advance and without invitation how the issue of the dispute shall be regarded. In some of these instances reversion to the attitude of 200 years ago seems to be prevalent.

Though the topic of intervention has been much discussed there are still wide differences of opinion as to whether a right of intervention can be maintained. The reason for some of the differences of opinion is the difference in defining intervention. Early definitions usually

regarded intervention as interference in the internal affairs of one state by another state, or the interference by a third state in the relations of two other states without the consent of either. Some later writers have employed the word to define interference which is primarily to secure observance of international obligations, thus transferring the ground from internal to external affairs. This would involve opposing or preventing action by a state which would imperil the rights of another state as a sovereign political unity. Others deny that such action on the part of a state as is essential to the maintenance of its independence or of the independence of another state in the community of nations is in any sense intervention, but affirm that this action is merely self-defense or maintenance of the obligations due to members of the community of nations among themselves. Such action is sometimes collective or, if not, is constructively in the nature of unselfish effort in behalf of the community. The growing interdependence of states as of individuals within states requires a greater degree of cooperation among states, and many modifications of the range of activities within which entire freedom may be exercised. These changes would not be extensions of the field of intervention but rather extension of the field within which each state may lawfully act and defend its right to act. The distinction between intervention and maintenance of rights is not always easy to make in practice. As the word intervention is used in time of peace, it seems, to indicate (1) interference by one state in the internal affairs of another, (2) interference by a state in the relations between two other states, and (3) measures taken by a state to maintain international rights or what it may claim to be international rights.

Belligerent vessels and neutral ports.—The entrance of armed forces of one state upon the land of another state has long been prohibited both in time of peace and in time of war. The entrance of naval forces of one state into the waters of another state in time of peace is

usually subjected to few restrictions and in time of war is ordinarily permitted under stated restrictions. It has been generally maintained that the belligerent should not throw upon a neutral, which desires to have no part in the war, burdens for the conduct of the war. This is evident in the first article of XIII Hague Convention, 1907, concerning the Rights and Duties of Neutral Powers in Naval War which states that "Belligerents are bound to respect the sovereign rights of neutral powers," and to refrain from all acts which if knowingly permitted by the neutral would constitute a nonfulfillment of its neutrality. The duty rests upon the belligerent and it is the right of the neutral to demand that the belligerent observe the obligations to which it is bound. This principle is international law as well as also explicitly set forth in the Convention.

The preamble of this Convention affirms that it is—

for neutral Powers, an admitted duty to apply these rules impartially to the several belligerents.

Article 2 provides,

Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.

Article 25 reciprocally places certain obligations upon the neutral, the performance of which under article 26 would not be considered unfriendly:

ARTICLE 25. A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters.

ARTICLE 26. The exercise by a neutral Power of the rights laid down in the present Convention can under no circumstances be considered as an unfriendly act by one or other belligerent who has accepted the Article relating thereto. (36 U.S.Stat., p. 2415.)

This XIII Hague Convention is one of rights and duties and an impartial application of the rules is implied.

One of the preliminary questions is whether belligerent ships of war should be allowed to enter neutral waters. This gives rise to the question as to what constitutes neutral waters. In a general way it may be said that the expression "neutral waters" is a term which covers all the maritime area over which the neutral state is entitled to exercise jurisdiction. This area would include the marginal sea as well as ports, roadsteads, and inland waters.

It is evident that the responsibility of a neutral state would differ in degree according to the area. It could be fairly affirmed that the responsibility within a port could be regarded as more complete than one on a remote coast or near the outer line of the marginal sea, a point which might not always be easy to determine.

Article 32 of the original British proposition at The Hague, 1907, aimed to recognize the difference of obligation by stating that the articles of the proposed rules should not be interpreted in such manner as to prohibit the simple passage of the ships of war or of auxiliary ships of a belligerent through neutral waters. In the discussion of this proposition the Turkish delegate said that his government could not sign an engagement which would limit its control of the Dardanelles and Bosphorus. There had previously been a proposition that straits connecting open seas should never be closed.

The Danish delegate explained his idea in regard to straits, saying:

> The amendment which the Danish delegation has taken the liberty of proposing to Article 32 of the British project limits the simple right of passage of war-ships and auxiliary vessels of a belligerent to the territorial waters uniting two open seas.
>
> The Danish delegation, in presenting this amendment, was inspired mainly by the following reasons:
>
> Recognition of an unlimited simple right of passage for belligerent war-ships can hardly be reconciled with the neutral's right to close interior waters for the purpose of defending his neutrality—notably bodies of water with two entrances—which offer

a belligerent fleet special opportunties as a base of operations, as well as for certain acts that are unlawful in neutral waters.

In granting belligerents the simple right of passage through territorial waters, and at the same time allowing neutrals to prevent admission to these waters, we would be taking away with one hand what we had given with the other.

As the laying of submarine mines by neutrals comes within the jurisdiction of another Commission, I cannot enter into the details of that question.

I only want to bring out the connection between the two questions and the desirability of not restricting by convention the exercise of a neutral's sovereign rights over his territorial waters in such a way as to deprive him of the most effectual means he has of enforcing the important prescriptions of this same convention. (Proceedings of The Hague Peace Conferences, Carnegie Endowment for International Peace, vol. III, p. 599.)

The regulation finally took a purely negative form as article 10.

The neutrality of a Power is not affected by the mere passage through its territorial waters of ships of war or of prizes belonging to belligerents.

Such a regulation may still leave the neutral state free to determine what action would involve more than simple passage through neutral waters.

It is generally admitted that there will be maritime areas within which belligerent ships of war will not be allowed to pass. Such areas have been specified from time to time in neutrality proclamations or otherwise. There seems therefore to be a general tendency to admit in practice the principle that while the waters of a neutral state are usually open to belligerent ships of war certain areas may be closed by general proclamation or by notification at the place.

Russo-Japanese War, 1905.—During the Russo-Japanese War, 1904–05, there were many examples of acts by belligerents which under ordinary conditions would be regarded as in violation of neutrality. Belligerent acts in Korea and in Manchuria were in an area technically neutral.

Admiral Togo, of the Japanese Navy, reported as follows in regard to the Russian destroyer *Ryeshitelni* in the neutral port of Chefoo:

According to the report from Commander Fujimoto, Commander of the First Torpedo-destroyer Flotilla, regarding the capture of the Russian destroyer *Ryeshitelni* at Chefoo, the Japanese destroyers *Asashiwo* and *Kasumi*, under the command of Commander Fujimoto, were searching for the enemy's warships on the night of the 10th inst. when one of the latter was sighted steaming westward. Our destroyers at once pursued the enemy, but the latter disappeared from view in the darkness of the night. A further search the following day (the 11th inst.) revealed the fact that the enemy's vessel had taken refuge in Chefoo harbour. Our destroyers accordingly remained outside the neutral zone, and waited for the Russian warship; but the enemy did not come out from the harbour.

On entering the port on the night of the 11th inst., our destroyers ascertained that the enemy's warship was the destroyer *Ryeshitelni*. It was also found that she had not been disarmed, but had taken in coal, all the officers and men remaining on board. At 3 p.m. on the 12th inst., Lieutenant Terajima of the *Asashiwo*, accompanied by ten petty officers and men, was despatched on board the enemy's destroyer, for the purpose of informing the captain of the Russian destroyer that our vessels had traced and watched him, and that, as he had entered the harbour at 4 a.m. the previous day and had not yet left it, he was offered an alternative either to issue from the harbour in one hour or surrender, the refusal of which would result in our disposal of the Russian destroyer at our will. The enemy, however, not only refused our demand, under various pretexts, but inflicted outrages by force on our officers and men. All of the Russians then jumped into the sea, meanwhile blowing up the fore part of the ship, whereupon we at once captured the destroyer and left the harbour at 5.15 p.m. with the vessel in tow. A Russian on board was taken prisoner. (S. Takahashi, International Law applied to the Russo-Japanese War, p. 437.)

According to the opinion of Professor Takahashi, who had been legal adviser to the Japanese fleet in the Chino-Japanese War and later a member of the legal committee of the Department of Foreign Affairs, the action in the case of the *Ryeshitelni* was justified. He says:

In the presence of this clear and distinct invasion of the neutrality of China by Russia and the failure of China to take any steps to prevent an infringement of her neutrality, the Japanese Government were fully justified in adopting such measures of self-protection as might seem necessary to them. They could not say that the unlawful acts of Russia and the supineness of China, working together, should be permitted to operate to the prejudice of their rights and interests. It is not alone in the matter of the *Ryeshitelni* that there has been a violation of the neutrality of Chefoo. In installing a system of wireless telegraphy between Port Arthur and the Russian Consulate at Chefoo there was a no less flagrant disregard of China's neutrality, and notwithstanding the repeated protests of the Japanese Government, China permitted the system to continue in operation. The Japanese Government had every wish and intention to continue to respect the neutrality of China outside those regions occupied by Russia so long as Russia did the same. But it is hardly to be expected that they would allow their enemy to escape the consequence of the war by disregarding China's neutrality. (Ibid., p. 441.)

General discussion at The Hague, 1907.—At the Hague Conference in 1907 the question of elaborating a convention relating to the conduct of ships of war in neutral ports was recognized as complex and difficult, but none the less essential. As the President of the committee, Count Tornielli, said:

It is indeed a useful thing to make certain common rules more precise, but only on condition that in seeking an agreement upon this subject the fact is not lost sight of that the legislative independence of the several countries must not be unduly hampered.

The logical deductions from the immutable principle of national sovereignty seem considerably to simplify our task. If they prevail, our only reply to the question that has been put to us could be included in four precepts, upon which it should not be difficult to reach an agreement.

These precepts may be formulated thus:

(1) Mutual recognition by the contracting Powers of their legislative independence in the matter of respect for neutrality.

(2) Impartial application to all belligerent parties of the laws which the several States have enacted.

(3) Mutual renunciation by neutrals of the right to introduce changes in their national laws in this respect while a state of war exists between two or more contracting Powers.

(4) Absolute duty of belligerents to respect the laws of neutrals.

I should like to see the work which we are about to undertake follow these lines. If we are able to advance a little in this direction, our time will not have been wasted and what we accomplish will be in the interest of progress. (Proceedings of the Hague Peace Conference, Carnegie Endowment for International Peace, vol. III, p. 573.)

The British delegate in presenting the somewhat elaborate set of rules in behalf of his Government, said:

My government has deemed it its duty to propose to the Conference the draft regulations which have been filed in its name, because it considers that it is of the utmost importance to define precisely the treatment which a neutral State may apply to belligerent vessels in its ports and territorial waters. We owe it to neutrals to indicate to what extent they will be permitted, in time of war, to give shelter to and to provision vessels of one of the belligerents without exposing themselves thereby to justifiable complaint on the part of the other belligerent. Likewise it is no more than just to state the treatment which belligerents will have the right to expect from neutrals. Uncertainty in this respect can only give rise to misunderstandings and disputes. Now, it is indisputable that uncertainty prevails with regard to this matter. We need only consult the texts to convince ourselves of this. Thus, to cite an instance, it is stated in a number of works on international law that the so-called 24-hour rule is universally recognized, while we know that several States do not recognize this rule, and do not consider themselves bound to observe it. (Ibid., p. 575.)

The Netherlands delegate pointed out the existing difficulties confronting a state having remote dependencies, saying:

The delegation of the Netherlands wishes to observe that the question which is on the day's order of business is of the utmost importance to its Government, which in recent wars has observed the most impartial neutrality, but which, because of the colonies that it possesses in different quarters of the world and of the numerous ports therein, has nevertheless been placed at times in a very embarrassing situation.

The Government of the Netherlands therefore greatly desires that all questions which may arise as a result of the stay of

belligerent warships in neutral ports and waters may henceforth be obviated by a common agreement, establishing a system sanctioned by the rules of conventional law.

Without taking a stand on all the questions that may come up in the course of our debates, I shall confine myself for the time being to a general observation. It would seem to me, first of all, whatever definitive system may be agreed upon, that the rules defining this system should be precise and clear and should not leave a loophole for any future ambiguity.

The neutral must know what he is expected to do. His freedom of action must not be restricted without legitimate cause. Belligerents must be guaranteed perfect equality of treatment. These are two cardinal rules which must serve as the basis of a just and equitable system. (Ibid., p. 578.)

The Japanese delegate pointed out certain difficulties under the present conditions:

There are not at present clear and universally recognized rules governing the relations between neutrals and belligerents with regard to the questions that have been laid before us, and history teaches us that the divergent and frequently conflicting interpretations and practices adopted in the past by different countries have been one of the most fruitful causes of international irritation and recrimination. It would therefore be desirable to remove as far as possible the dangers arising from this state of affairs.

The peaceful acts of neutrals should be respected to the greatest possible extent and as far as is compatible with the recognized rights of belligerents and should be allowed to proceed without being disturbed by war; but in order to insure the result desired, neutrals should see to it, on their side, that their territories and territorial waters are not utilized by belligerents as bases for the carrying on of military enterprises, so as to furnish cause for complaint.

To further the cause of peace by warding off war, to prevent abuse of the hospitality of neutrals by drawing a clear distinction between permissible peaceful acts and prohibited military operations on the part of belligerents in neutral ports and waters, to discourage as much as possible the use of these neutral ports and waters for military purposes by means of restrictions acting in a way as automatic prohibitions, without affecting in any way whatsoever the right and privilege of using these ports and waters as places of refuge and for purely humanitarian purposes, to protect neutrals in the enjoyment of their rights and in the

fulfillment of their duties by specifically defining these rights and duties—such is the purpose of the Japanese proposal. (Ibid., p. 579.)

Perhaps M. Louis Renault, the reporter of the subcommittee having in charge the question of belligerent vessels in neutral waters, would be considered as speaking with the most general knowledge. He gave careful consideration to all the proposals and said after the preparation of the questionnaire and in his capacity as a French delegate rather than as reporter.

The exercise of the neutral's right of sovereignty, whose source is the common law, must naturally be reconciled with observance by the neutral of the duty incumbent upon him not to take part in hostilities. Now, as a matter of fact, the positive law of nations, as it stands at present, allows neutral States great latitude in regulating the status of belligerent war-ships in neutral ports and waters. This latitude has resulted in giving rise to divergences in the laws of the various countries on the subject, which divergences show themselves in the declarations of neutrality promulgated by neutrals on the outbreak of war. And that is not all. There have been cases where the same country has not observed the same rules of neutrality in different wars; at times it has even happened that it has changed its rules during different phases of the same war. This shows the very great uncertainty there is on this subject, a very annoying uncertainty, causing misunderstandings, recriminations, and at times calculated to lead to disputes.

Again, it may happen that this or that rule may, under various circumstances, favor one of the belligerents, although it was not made in his behalf. Geographical or military circumstances may create a situation that is to his advantage, without there being any intention on the part of the neutral to favor him. The other belligerent naturally finds this consequence an annoyance and may even be led to lodge a complaint on that score.

From this point of view it would be very beneficial to settle upon uniform regulations which, as they would not emanate from any one State, would be observed the more willingly. This general regulation, which is so desirable, would have the effect of eliminating causes of complaint which might easily degenerate into disputes.

Such is the ideal, if we can hope to succeed in reaching an agreement upon all the points and in concluding a general Con-

vention. But if it were merely possible to reach an agreement upon a few rules, we would thereby have reduced the uncertainty and narrowed the field of possible disputes. It is proper to note, in this connection, that as regards the points upon which it has been impossible to reach an agreement, the fundamental principle would remain intact and the legislative bodies of the several States, as our President has pointed out, would retain all their rights. (Ibid., p. 581.)

The demand for some regulations which should be so far as possible uniform was quite general. The inclination of the Conference was in the main favorable to clear statements in the rules. Naturally it was not possible to reach agreement upon all topics.

Report, Hague Conference, 1907.—In the report of M. Louis Renault made to the Hague Peace Conference in 1907 upon the Convention concerning the Rights and Duties of Neutral Powers in Naval War, after commenting on the accepted principle that " The territory of neutral States is inviolable ", M. Renault says:

Generally speaking, it may be said belligerents should abstain from any act which, if it were tolerated by the neutral state, would constitute failure in its duties of neutrality. It is important, however, to say here that a neutral's duty is not necessarily measured by a belligerent's duty; and this is in harmony with the nature of the circumstances. An absolute obligation can be imposed upon a belligerent to refrain from certain acts in the waters of a neutral state; it is easy for it and in all cases possible to fulfill this obligation whether harbors or territorial waters are concerned. On the other hand, the neutral state cannot be obliged to prevent or check all the acts that a belligerent might do or wish to do, because very often the neutral state will not be in a position to fulfill such an obligation. It cannot know all that is happening in its waters and it cannot be in readiness to prevent it. The duty exists only to the degree that it can be known and discharged. (Proceedings of The Hague Peace Conferences, Carnegie Endowment for International Peace, vol. I, p. 291.)

The report prepared by Mr. Renault referring to article 5 which prohibits the use of neutral waters as a base of operations, and recognizing that this article is

based on the second rule of the Treaty of Washington, says:

While the principle is easily stated, its applications require much care. We limit ourselves to giving one example by prohibiting a belligerent to erect on neutral territory a wireless telegraphy station or any apparatus for the purpose of communicating with a belligerent force on land or sea. The same provision occurs in the draft Regulations respecting the rights and duties of neutral States in war on land. The two provisions correspond exactly, for communication may be made from neutral territory either with an army or with a fleet.

We cannot expect to prevent the captain of a belligerent ship from communicating with the inhabitants or the consul of his country, or from using telegraph or telephone cables of the neutral country. There is a formal provision to this effect in Article 8 of the draft regulations on land warfare already referred to. It was suggested that we forbid making a neutral port a place for *concentration* or *rendezvous*. But it is hard to define what this would mean, and it would be almost impossible for neutral States to deal with the intention which brings a belligerent vessel into their waters. The interest in this question will be greatly diminished by the fixing of the maximum number of belligerent ships that may stay in a port at the same time. (Ibid., p. 293.)

The Tinos, 1917.—The German vessel *Tinos* and other vessels seized in the waters of Greece in September 1916 were declared good prize by the French Court in November 1917. It was argued for the Germans that the waters of Greece were at the time of the seizure of the vessels neutral waters. The French court considered that Grecian territory had already been used by the German forces in contravention of the laws of neutrality and had in consequence become an area of hostilities and lost its neutral status as regards the specific seizures before the court.

Considérant, dans ces conditions, que, sans avoir à apprécier ici, du point de vue de la neutralité, l'attitude du governement royal alors au pouvoir en Grèce, il suffit de constater qu'en fait la succession d'actes d'hostilités accomplis par les ennemis dans les eaux et le territoire de la Grèce a transformé ceux-ci en un théâtre de la guerre et leur a enlevé *de facto* le bénéfice d'une

neutralité que les navires ennemis prétendraient vainement invoquer aujourd' hui. (Journal Officiel, 9 January, 1918, 401.)

Cases are possible in which a part, or the whole of the territory of a neutral State falls within the region of war. These cases arise in wars in which such neutral territories are the very objects of the war, as were Korea (then an independent State) and the Chinese province of Manchuria in the Russo-Japanese War; or when a neutral State, either deliberately, or because it has not at its disposal sufficiently strong naval forces, does not prevent a belligerent from committing hostilities in its territorial waters and making them a basis for military operations and preparations. These territorial waters become in consequence a part of the region of war, and the other belligerent may also commit hostilities there. (2 Oppenheim, International Law, 4th ed., p. 146.)

Disturbed conditions in Danzig, 1931.—For several years the use of the port of Danzig by Polish warships had been a matter disturbing the relations between the Free City of Danzig and Poland. The Danzig Government had maintained that Polish vessels of war were bound by the same international regulations as foreign vessels of war under other flags.

The report by Danzig in regard to Danzig-Polish relations during the 2½ months before August 14, 1931, states:

As regards military measures, the Danzig-Polish relations since the last session of the Council have been specially aggravated by the fact that on July 1st last, after the expiry of the Agreement concerning the access of Polish warships to the port of Danzig, Poland suddenly and without any special reason sent patrols of Polish sailors through the streets of Danzig and thereby created, as will readily be understood, great excitement among the Danzig population. The latter regarded those measures as highly provocative, and the Government of the Free City was obliged to apply to the High Commissioner of the League of Nations for a decision under Article 39 of the Paris Treaty of November 9th, 1920. (Permanent Court of International Justice, series C, no. 55, p. 41.)

In a report of August 15, 1931, the High Commissioner of Danzig says, in part,

At its meeting on May 22nd, 1931, the Council of the League of Nations invited me "to submit a further report on the situation

for the next session of the Council." I accordingly have the honour to follow up my report of April 25th, 1931, by submitting the present report to the Council:

On my return to Danzig at the end of May, I soon noted that the agitation caused by the deplorable incidents between Danzig citizens and Poles which occurred during April and to which I considered it my duty to draw the Council's attention in a special report had subsided to some extent. Unfortunately, I found that the general situation at Danzig was not so satisfactory; disturbances owing to party strife were still continuing. During the month of June, particularly violent clashes occurred between the organizations of the extremist parties even in the centre of the town, and, if they had spread, they would have constituted a very serious menace to public security. (Permanent Court of International Justice, series C, no. 55, 1931. Access to, or Anchorage in, the Port of Danzig of Polish War Vessels, p. 14.)

The question referred to the Permanent Court of International Justice for an advisory opinion was:

Do the Treaty of Peace of Versailles, Part III, Section XI, the Danzig-Polish Treaty concluded at Paris on November 9th, 1920, and the relevant decisions of the Council of the League of Nations and of the High Commissioner, confer upon Poland rights or attributions as regards the access to, or anchorage in, the port and waterways of Danzig of Polish war vessels? If so, what are these rights or attributions? (Ibid., p. 9.)

Attitude of Cuba, 1914.—Cuba, in an early decree in the World War on August 10, 1914, stated, "It is forbidden for a belligerent to make use of a wireless-telegraphy apparatus belonging to the Government."

Swiss regulation, 1914.—By an ordinance of August 2, 1914, Switzerland took action at the beginning of the World War to maintain strict neutrality in the use of radio. The ordinance was issued in accordance with proposals of the military department as follows:

ARTICLE 1. The creation of new radio stations is forbidden on all territory of the Swiss Confederation.

ART. 2. The utilization of radio stations which already exist and have obtained a concession is forbidden. The organs of the telegraph and telephone administration will render the stations incapable of use without delay by removing the receiving apparatus, if there is any, or the parts indispensable for their use.

The parts of the apparatus removed are to be preserved by the telegraph and telephone administration.

ART. 3. There are not included in this prohibition stations established by the telegraph and telephone administration, or those which have been established for the needs of the army.

ART. 4. Violations of the present provisions, if there has been a reception or sending of news of any nature whatever, will be proceeded against according to the penal provisions established against those who spread, intentionally or by negligence, news of a military nature. If there has been only the illegal establishment of a station or the maintenance of an existing station, of which it has not been proved that it has been used, the penalty will consist in a fine and the station will be immediately closed. If there is reason to suspect that the station is intended to be used as a means of information for the benefit of a foreign State, proceedings for espionage will be commenced. (1916, Naval War College, Int. Law Topics, p. 68.)

Article 14 of the ordinance of August 4, 1914, laid down explicit prohibitions as to use:

It is absolutely forbidden to the belligerent parties to establish or use on Swiss territory a radio station or any other installation (telephone, telegraph, signal station, optical or other, carrier pigeon station, aviation station, etc.), designed to serve as a means of communication with the belligerent forces on land or sea or to offer facilities for the same in any manner whatsoever. (Ibid., p. 73.)

Action of United States, 1914.—An Executive order of August 5, 1914, provided that—

"all radio stations within the jurisdiction of the United States of America are hereby prohibited from transmitting or receiving for delivery messages of an unneutral nature, and from in any way rendering to any one of the belligerents any unneutral service, during the continuance of hostilities." (1916, Naval War College, Int. Law Topics, p. 87.)

A further order of September 5, 1914, was concerned with high-powered stations capable of trans-Atlantic transmission and it was provided that these "shall be taken over by the Government of the United States and used or controlled by it to the exclusion of any other control." (Ibid., p. 91.) The Secretary of the Navy was to enforce these orders. Radio installations in the Pan-

ama Canal Zone and waters were to be used only on Canal business. (Ibid., p. 99.)

Colombian attitude, 1914–15.—During the World War problems arose as to the use of radio stations already established on Colombian territory. One company was owned by a belligerent, one station was Colombian property, and one was owned by a neutral company. A resolution of July 14, 1915, provided as to these stations which had been the subject of much discussion and negotiation since the outbreak of the World War that—

1. The radio station of Cartagena will continue, subject to the measures previously adopted for preventing its use, under the inspection and supervision of the official Colombian expert and the local political authorities. If these authorities, in accord with the expert, consider new orders or new measures necessary for the better assurance of the neutrality of the Republic, they will decree them on their own authority in urgent cases and in ordinary cases will consult this ministry. The home of the German employees who previously worked in the station will not be troubled, although this home be near the place of the radio apparatus, the use of this apparatus continuing to be absolutely impossible.

2. The station of San Andres will remain closed for a time and in the manner which will be indicated by the competent ministry.

3. The station of Santa Marta can continue to exercise its rights, but subject always to the departmental and national authorities; but it can not have in its service individuals of the nationality of any of the belligerents. (1916, Naval War College, Int. Law Topics, p. 46.)

Commission of Jurists, 1923.—The practices and regulations during the World War showed the need for regulation. The Washington Conference on the Limitation of Armament recommended the appointment of a commission to consider new agencies of warfare. This Commission of Jurists, meeting at The Hague, reported February 19, 1923, upon rules in regard to radio and in regard to aerial warfare. Referring to article 8 of the 1907 Hague Convention mentioned above, the Report of the Commission says,

but while article 8 stipulates that a neutral Power is not bound to forbid or restrict the use of wireless installations by a belligerent, and article 9 relates to the restrictive or preventive measures taken by a neutral Power for this purpose, measures which must be applied impartially to the belligerents, article 4 [of the Commission's rules following] imposes on neutral Powers the duty of preventing the transmission by radio of any information destined for a belligerent concerning military forces or military operations.

This article is a compromise. On one side one Delegation pointed out that the 1907 system had stood the test during the war when neutral Governments had taken under article 9 of the 1907 Convention restrictive or preventive measures which were quite satisfactory. On the other side it was pointed out that those measures had been taken precisely for the purpose of complying with the obligation imposed by neutrality, and that it would be well to define this obligation so as to help and protect neutral Powers in preventing the violation of their neutrality and thereby reducing the probability of their becoming involved in the war. Agreement was reached on the basis of a text indicating exactly the character of the messages prohibited, viz., messages concerning military forces and military operations. It is understood that the prohibition would not cover the repetition of news which has already become public.

It has been agreed that the article does not render necessary the institution of a censorship in every neutral country in every war. The character of the war and the situation of the neutral country may render such measures unnecessary. It goes without saying that neutral Governments are bound to use the means at their disposal to prevent the transmission of the information in question.

The second paragraph merely reproduces the first paragraph of article 9 of the Convention of 1907. The phrase "destined for a belligerent" covers all cases where the information is intended to reach the belligerent, and not merely messages which are addressed to the belligerent.

Article 4.

A neutral Power is not called upon to restrict or prohibit the use of radio stations which are located within its jurisdiction, except so far as may be necessary to prevent the transmission of information destined for a belligerent concerning military forces or military operations and except as prescribed by article 5.

All restrictive or prohibitive measures taken by a neutral Power shall be applied impartially by it to the belligerents. (1924, Naval War College, Int. Law Documents, p. 100.)

Article 5 of the Commission's report here referred to is as follows:

ARTICLE 5.

Belligerent mobile radio stations are bound within the jurisdiction of a neutral state to abstain from all use of their radio apparatus. Neutral Governments are bound to employ the means at their disposal to prevent such use. (Ibid., p. 101.)

Responsibility of a state for radio.—The responsibility of Canada for radio was raised in a case which went by appeal to the Judicial Committee of the Privy Council. The questions shortly stated were:

(1) Has the Parliament of Canada jurisdiction to regulate and control radio communication? (2) If not, in what particulars is the jurisdiction limited?

(*In re* Regulation and Control of Radio Communication in Canada. (1932) A.C. 304.)

In the course of the decision it was said:

Canada as a Dominion is one of the signatories to the convention. In a question with foreign powers the persons who might infringe some of the stipulations in the convention would not be the Dominion of Canada as a whole but would be individual persons residing in Canada. These persons must so to speak be kept in order by legislation and the only legislation that can deal with them all at once is Dominion legislation. (*Ibid.*, 312.) * * * The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada. (*Ibid.*, 313.)

Control of communications.—In time of war a belligerent may control communications within its own area to the extent which it deems essential with due regard for its obligations under international law and treaties. This right has led to various degrees of censorship in recent years and to the resort to practices of doubtful

legality. Even in the Spanish-American War, 1898, the United States maintained the right to prohibit all cipher messages regardless of source or destination.

The control of communications by neutrals must necessarily be commensurate with neutral responsibility, but the 1907 Hague Convention respecting the Rights and Duties of Neutral Powers and Persons in Cases of War on Land in article 8 states that:

> A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to Companies or private individuals. (1908, Naval War College, Int. Law Situations, p. 190.)

Neutral powers did, however, restrict the use of radio by belligerents in the World War, 1914–18.

Basic considerations.—The *Xane* may follow the *Young* into port of B. Under normal conditions it must refrain from acts which, if knowingly permitted by B, would constitute a nonfulfillment of neutrality—specifically, such as capture or visit and search, or pursuit in the technical sense.

Under abnormal conditions, when the neutral state is admittedly unable to maintain its neutrality, a belligerent must take such measures as are essential to security of its forces, as being the only competent authority in the area.

The Nine-Power Treaty of the Washington Conference, 1921–22, envisages the mutual obligation of the belligerent to respect, and of the neutral to maintain, neutrality:

> ARTICLE VI. The Contracting Powers, other than China, agree fully to respect China's rights as a neutral in time of war to which China is not a party; and China declares that when she is a neutral she will observe the obligations of neutrality. (1921, Naval War College, Int. Law Documents, p. 349.)

As the rights and obligations of the neutral are reciprocal, and if the neutral is not able to fulfill its obligations, the belligerent must to that extent be free to take

measures essential to its protection, for in neutral waters, the belligerent obligation to refrain from hostile action is based upon presumption of local protection against belligerent acts on the part of the enemy forces.

Manifestly such action should not be beyond what would be justified upon the high sea where an enemy merchant vessel unarmed and engaged merely in regular commerce would be liable under ordinary conditions to capture only. Within neutral jurisdiction capture would be justified only upon grounds that would imply that the mere presence of the merchant vessel of Y in the port of B endangered the cruiser of X. As the authorities of B are unable to protect the cruiser of X, in case of evident risk the commander of the cruiser is under obligation to take the action that he might otherwise call upon the authorities of B to take. The only method by which the commander can inform himself as to the character of the merchant vessel of Y is by visit and search which would be with view to assuring his safety.

If by visit and search he finds the *Young* is armed and equipped to cruise against state X, he would act accordingly. State B would in no appreciable degree be injured, by taking from one of its ports, where it was impotent, a vessel which might endanger the peace of the port or threaten the safety of a friendly state; while on the other hand interference within its ports with commerce which would disturb the course of its trade would be unjustifiable and a ground for reparation.

The recent development and use of radio at the time of the formulation of the Hague Conventions in 1907 naturally left many matters for regulation by subsequent action. The use of radio in the Russo-Japanese war, 1904–5, had given rise to a few problems for some of which the Hague Conventions made provisions. The 1907 Hague Convention (V) concerning the Rights and Duties of Neutral Powers and Persons in case of War on Land embodies certain prohibitions.

ARTICLE 3. Belligerents are likewise forbidden to:

(*a*) Erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea;

(*b*) Use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.

ARTICLE 8. A neutral power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to Companies or private individuals.

ARTICLE 9. Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be impartially applied by it to both belligerents.

A neutral Power must see to the same obligations being observed by Companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus. (1908, Naval War College, Int. Law Situations, pp. 189-190.)

The 1907 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War also covered certain relations of radio telegraphy:

Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea. (Ibid., p. 215.)

During the World War, 1914–18, however, the neutral control of radio became much extended. The United States, by an Executive Order of President Wilson, took over some of the high-power radio stations and placed them under control of the Navy, and regulations were prescribed to assure the Government that messages of an unmistakably neutral character only should be transmitted by these stations.

SOLUTION

(*a*) The *Xane* should take no action against the *Young* merely because the *Young* has entered the port of B. In case the *Xane* is convinced that the *Young* is

abusing its privileges in B because of the weakness of the local authorities, the *Xane* may visit and search the *Young* as a basis for determining subsequent action.

(*b*) If the *Yarrow* remains in port more than 24 hours, unless for the lawful taking on of coal or supplies or making repairs to render the ship seaworthy, the commander of the *Xane* may request the authorities of state B to intern the *Yarrow*.

(*c*) The commander of the *Xane* should protest against military use of radio and if no competent local authority is present, should take such measures as may be least arbitrary to prevent its use.

Situation II

ARTIFICIAL STRUCTURES AND MARITIME JURISDICTION

States X and Y are at war. Other states are neutral.

(*a*) A merchant vessel of state N, the *Nagle*, is anchored in the lee of and 1,000 feet from a lighthouse of state R. The lighthouse is 14 miles off the coast of state R and is built upon a reef always submerged. A cruiser of state X, the *Xanthos*, approaches and is about to visit and search the *Nagle*, when vessels of war of states N and R appear and the *Nagle* calls upon both for protection.

(*b*) State R has also established a landing station for aircraft built upon a submerged reef 20 miles from any land. Would the same solution as for (*a*) hold in case the *Nagle* was anchored off this station.

(*c*) State R has also established a floating landing station for aircraft anchored to a submerged reef 20 miles from any land. Would the same solution as for (*a*) hold in case the *Nagle* was tied to the floating landing station?

(*d*) State R has filled in a strip of shallow water out from its coast a distance of 5 miles, thus making a narrow causeway to a landing station for aircraft. The station is built upon a reef which is always submerged. Would the same solution as for (*a*) hold in case the *Nagle* was sailing within 1 mile of the causeway but 4½ miles from the mainland of R?

(*e*) How should an aircraft of Y be treated by: (1) a cruiser of X, and (2) by a military aircraft of X when not more than 3 miles from the landing station mentioned in (*b*), the floating landing station mentioned in (*c*) and the causeway mentioned in (*d*)?

SOLUTION

(*a*) The visit and search of the neutral merchant vessel is lawful, as there is no territorial sea around the lighthouse built upon a submerged reef 14 miles from any coast. No protection other than to assure the lawful exercise of the visit and search should be given to the *Nagle*.

(*b*) The visit and search of the neutral merchant vessel is lawful, as there is no territorial sea around the landing station for aircraft built upon a submerged reef 20 miles from any land. No protection other than to assure the lawful exercise of the visit and search should be given by neutral vessels of war to the *Nagle*.

(*c*) The visit and search of the *Nagle* tied to an anchored landing station for aircraft of R is lawful, as there is no territorial sea around the landing station for aircraft 20 miles from any land. No protection other than to assure the lawful exercise of the visit and search should be given to the *Nagle*.

(*d*) The visit and search of the neutral merchant vessel within 1 mile of a causeway built out from shore to a landing station for aircraft is not lawful, as the merchant vessel is within territorial sea and the vessel of war of R should afford protection against any violation of the neutrality of state R, and should protect the merchant vessel against any violation of its rights within these waters.

(*e*) All enemy aircraft are liable to capture if nonmilitary, or to attack if military, when not on or over the landing station mentioned in (*b*) or (*c*). Enemy aircraft may not be lawfully captured or attacked when within 3 miles of the causeway or landing station mentioned in (*d*) but should be interned.

NOTES

High seas.—The rights of states and of persons in regard to the high seas has been a matter of differing opinion and practice from early times. This is under-

standable when the nature of the sea and its varied uses are considered. When the sea is regarded as the barrier against invasion, the attitude would be different from that at a time when the sea is regarded as a highway between countries. There would also be the differences due to interest in the seas as a source of food supply and as the way of commerce. The theories and contentions of Grotius in Mare Liberum, 1608, made clear the demand for freedom of the sea which Selden in Mare Clausum, 1635, tried to meet by somewhat exaggerated, though ably presented, pretentions of England for a closed sea.

A survey of the material relating to the control and use of the sea shows the influence of national interests upon the views sustained which range from that of exclusive proprietary rights to the denial of any control. The claim to exclusive property in the sea was gradually abandoned, but other interests remained which could not be abandoned. It had been found that many pretensions and paper claims embodied in proclamations and decrees were not worth maintaining. There was, therefore, growing willingness to accept Bynkershoek's proposal of 1702 that the authority of the state over the sea should extend to the effective range of the cannon, which at that time was estimated to be 3 miles. The 3-mile limit became more and more conventionalized but was not universally accepted even at the Hague Codification Conference in 1930.

Use of the sea.—While there are differing theories as to the nature of maritime rights, there is a general agreement that innocent use of the sea is common to all. What the limits of innocent use are is debatable and has aroused controversies. Some of the controversies have been settled by the course of events without any formal abandonment of positions assumed by any party; others have resulted in treaty agreements or understandings. In general, it may be said that use, as

in navigation, is accepted as a right of all; and abuses, as by pollution, is denied as generally injurious.

In concrete instances, such as the laying of submarine cables, there is an admitted innocent use which may be supported against negligent use such as careless dragging of an anchor upon the sea bottom in a submarine cable area, or there may be an admitted abuse such as in the case of piracy, or a conventional abuse as in slave trade.

The problem of use and abuse in time of war differs materially from the same problem in time of peace, and belligerent use differs from neutral use. The limits of territorial jurisdiction are not changed by virtue of use or abuse of the sea in time of peace or in time of war though the rights of use may be modified.

Aids to navigation.—While islands as products of natural forces are generally appropriated, artificial structures have a status differing somewhat according to circumstances.

The free use of the sea by all under ordinary conditions is now admitted. Ships may sail at will on the high sea. That they may sail safely, it is essential that dangerous places be marked. That the voyage may be convenient and profitable, it is essential that routes be buoyed and lighted and that depths be known. For such purposes national agencies have been permitted to assume a degree of jurisdiction outside their maritime limits. States have built and maintained lighthouses on reefs well beyond their maritime jurisdiction and have marked channels in the high seas. They serve the general good but may specially benefit the state which has undertaken their construction and maintenance. It may be true that the locating in the high seas of some aid to navigation may modify the path of commerce and benefit one state at the cost of another, but if it is for the general good, the action of the state benefited will often be approved as setting an example to other states.

General considerations.—All states have a common right to use the high seas for navigation and to a share in its resources. Long and unopposed appropriation of the products of the sea by a state in a certain area may lead other states to acquiesce in the claim of exclusive use, or treaties between states may voluntarily regulate the use of the high sea or its resources so far as the states parties to the treaties are concerned.

Extension of authority beyond the territorial sea has been tolerated in certain cases as a measure of protection in such instances as in the establishing of defense areas adjacent to fortifications or for strategic reasons. The placing of lighthouses, buoys, etc., which serve all alike has become customary and the state which has constructed and placed the lighthouse or buoy has admittedly the jurisdiction over it, but it is now generally maintained that the jurisdiction of the state does not extend beyond the lighthouse itself into the surrounding high sea. Perhaps it might be affirmed that artificial structures built in the high seas do not extend the area of the territorial sea of the state placing the structure, while structures built out from the land may extend the coast line and correspondingly extend the territorial sea measured from that line. Areas appearing above the surface of the sea from natural causes have been regarded as belonging to the nearby state as in the case of the *Anna*, 1805 (5 C. Robinson 373), when the British Court held that mud islands formed at the mouth of the Mississippi River were American territory and that jurisdiction extended 3 miles from these islands. Islands discovered in the high seas at a distance from land belong to the discoverer if they are subsequently occupied or if steps are taken for effective occupation.

Suggestions as to jurisdiction.—Various suggestions have been made from time to time as to jurisdiction over "airports in the high seas", "floating islands", "marine bases for aircraft", "sea bases for aircraft", "sea-

dromes", or over such contrivances under some other title. In 1925 the American Institute of International Law put forth what is called a project in regard to jurisdiction, of which articles 13 and 14 were as follows:

ARTICLE 13.

The American Republics whose coasts are washed by the waters of the sea and which possess a navy or mercantile marine, shall have the right to occupy an extent of the high sea contiguous to their respective territorial sea necessary for the establishment of the following more or less permanent installations, provided they are in the general interest:

1. Bases for nonmilitary airships and dirigibles;
2. Wireless telegraph stations;
3. Stations for submarine cables;
4. Lighthouses;
5. Stations for scientific exploration;
6. Refuge stations for the shipwrecked.

ARTICLE 14

It is expressly forbidden to fortify the installations referred to in the preceding article and to use them, even indirectly, as bases of supply for warships, military airplanes and dirigibles, or for submarines. (20 American Journal International Law, Special Supplement, 1926, p. 325.)

This subject had been mentioned in Professor Schücking's report to the League of Nations Committee on Territorial Waters. He said:

As regards islands which are artificially created by anchorage to the bed of the sea, and which have no solid connection with the bed of the sea, but which are employed for the establishment of a firm foundation, e.g., for enterprises designed to facilitate aerial navigation, we must be guided by the view that such an enterprise cannot claim that a special zone of territorial sea is constituted round such artificial island. Such fictitious islands must be assimilated to vessels voyaging on the high seas.

It has been discussed whether a zone of territorial sea should be established around artificial islands which are actually connected with the bottom, such as islands designed to carry lighthouses; there is no uniform legal doctrine as regards such islands. This is evident from the fact that two such eminent authorities

as the English judge, Lord Russell, and the jurist, M. L. Oppenheim, have expressed divergent views.

Lord Russell states: "If a lighthouse is built upon a rock or upon piles driven into the sea, it becomes, as far as that lighthouse is concerned, part of the territory of the nation which has erected it." Oppenheim says: "Il n'y pas de droits de souveraineté sur une zone de la mer que baigne les phares." (Ibid., p. 87.)

After discussion no mention of this subject appeared in the amended draft.

The circulation of aircraft in relation to the high sea was a particular subject of discussion at the Neuvième Congrès International de Législation Aérienne in 1930. After several days of discussion, the following text was adopted:

AÉROPORTS DE HAUTE MER

ARTICLE PREMIER.—Aucun aéroport de haute mer, créé pour les besoins de la navigation aérienne, qu'il soit la propriété d'un particulier ou d'un Etat, ne peut être établi en haute mer autrement que sous l'autorité et la responsabilité d'un Etat, que ce dernier ait un littoral maritime ou non.

ART. 2.—L'Etat sous l'autorité duquel se trouve place cet aéroport de haute mer en règle les conditions d'accès et d'exploitation.

Si l'aéroport de haute mer est ouvert à l'usage public, aucune discrimination ne peut être faite, au point de vue de l'accès, sur la base de la nationalité.

ART. 3.—Les Etats doivent porter réciproquement à leur connaissance leurs projects de création d'aéroports de haute mer.

Au cas où dans un délai à determiner quelque Etat s'y opposait le différend serait porté devant la Société des Nations et tranché par elle.

Si pour une raison quelconque la Société des Nations ne pouvait être utilement saisie—ou si elle ne parvenait pas à regler le différend—les parties seront tenues de recourir à la procedure de l'arbitrage obligatoire. (9 Congrès International de Législation Aérienne, p. 233.)

While certain propositions in regard to the treatment of seadromes in time of war had been before the Congress, no conclusions were agreed to as a result of the deliberations.

Resolutions, Budapest, 1930.—At the ninth meeting of the Comité Juridique International de l'Aviation at Budapest, October 1, 1930, certain resolutions were also, after discussion, adopted. These were as follows:

ARTICLE PREMIER.—Aucun aéroport flottant, créé pour les besoins de la navigation aérienne, qu'il soit la propriété d'un particulier ou d'un Etat, ne peut être établi en haute mer, autrement que sous l'autorité et la responsabilité d'un Etat, que ce dernier ait un littoral maritime ou non.

ART. 2.—L'Etat sous l'autorité duquel se trouve placé cet aéroport flottant en règle les conditions d'accès et d'exploitation.

Si l'aéroport flottant est ouvert à l'usage public, aucune discrimination ne peut être faite, au point de vue de l'accès, sur la base de la nationalité.

ART. 3.—Les Etats doivent porter réciproquement à leur connaissance leurs projets de création d'aéroports flottants.

Au cas où dans un délai à déterminer quelque Etat s'y opposerait, le différend serait porté devant la Société des Nations et tranché par elle.

Si, pour une raison quelconque, la Société des Nations ne pouvait être utilement saisie—ou si elle ne parvenait pas à régler le différend—les parties seront tenues de recourir à la procédure de l'arbitrage obligatoire.

ART. 4.—En temps de guerre, un aéroport de haute mer ne peut être l'objet ni de capture, ni de déroutement. Toutefois, quand l'aéroport relève de l'un des belligérants, l'autre peut le faire passer sous son autorité.

En aucun cas il n'est permis à l'un des belligérants de convertir un aéroport neutre en base aéro-navale. Un tel usage engagerait, conformément aux principes généraux de la neutralité, la responsabilité de l'Etat qui a autorité sur l'aéroport de haute mer. (XV Droit Aérien, p. 24.)

Discussion in the Institut de Droit International, 1913.—In 1913 the Institut de Droit International discussed the subject of maritime jurisdiction. Sir Thomas Barclay and Prof. L. Oppenheim made the report, but they were not in entire accord. In the report of Professor Oppenheim was also pointed out some questions relating to jurisdiction over lighthouses:

Ayant discuté les trois articles de l'avant-projet de Sir T. Barclay sur lesquels je ne suis point d'accord avec lui, je voudrais maintenant attirer l'attention sur un point important qui n'est

pas mentionné dans le rapport de Sir T. Barclay, c'est-à-dire, la question des phares bâtis sur des rochers ou des bancs de mer. C'est une règle fixe que la zone de la mer territoriale doit être mesurée à partir de la laisse de basse marée de la côte, que cette côte soit celle de la terre ferme ou celle d'une île située dans la zone de la mer territoriale de la terre ferme, ou la côte d'une île située dans la haute mer et occupée par un Etat. La question se pose donc de savoir si un phare bâti sur un rocher ou sur un banc de mer submergé, dans la haute mer ou dans la mer territoriale, doit être considéré comme si c'etait une île, de sorte que l'Etat possesseur du phare aurait un droit de souveraineté sur une mer territoriale à l'entour de ce phare.

Ce point est de haute importance, car beaucoup de phares sont bâtis sur des rochers ou sur des piles enfoncées dans le lit de la mer en dehors de la mer territoriale. Par example, le fameux phare d'Eddystone dans la Manche est à quatorze milles de la côte du Devonshire. (26 Annuaire de l'Institut de Droit International p. 408.)

Professor Oppenheim then refers to the position of Sir Charles Russell in the Bering Sea Arbitration which is not entirely clear and says—

Si cette assertion de Sir Charles Russell était juste, il serait nécessaire d'accorder à tout Etat qui a bâti un tel phare un droit de souveraineté sur la mer territoriale entourant ce phare; mais, à mon sens, cette assertion n'est pas justifiée. Je crois que l'assimilation des phares aux îles est de nature à induire en erreur, et qu'il vaudrait mieux traiter les phares sur le même pied que les bateaux-phares amarrés. De même qu'un Etat n'a pas le pouvoir de reclamer souveraineté sur une mer territoriale à l'entour d'un bateau-phare amarré, de même il n'a pas le pouvoir de reclamer cette souveraineté sur une zone maritime à l'entour d'un phare dans la mer.

Pour cette raison, je proposerais d'ajouter à l'article 1er de l'avant-projet l'alinéa 3 qui suit: "Il n'y a pas de droit de souveraineté sur une zone de la mer qui baigne les phares." (Ibid., p. 410.)

Acquisition of island jurisdiction.—Where an island is discovered and occupied, it is commonly considered as being under the jurisdiction of the state of the flag of the discoverer and occupier if it is outside the maritime limits of any other state. Even if an island should be thrown up by volcanic or other force, the state of the

discoverer would have valid claim to jurisdiction. This practice of appropriation by the discoverer and occupier has long been recognized.

What is an island?—It is generally admitted that territorial sea may be claimed around an island to be measured as from the mainland.

In the general observations submitted by governments which became the bases of discussion for the League of Nations Conference for the Codification of International Law, there were replies to the question, what is meant by an island in considering its relation to territorial waters?

The reply of Great Britain, with which other states of the British Commonwealth of Nations generally agreed, was as follows:

> An island is a piece of territory surrounded by water and in normal circumstances permanently above high water. It does not include a piece of territory not capable of effective occupation and use.
>
> His Majesty's Government consider that there is no ground for claiming that a belt of territorial waters exists round rocks and banks not constituting islands as defined above, and would view with favour an international agreement to this effect in order that there may be no doubt as to the status of the waters round such rocks and banks and round artificial structures raised upon them. (Conference for the Codification of Int. Law. League of Nations. C. 74 M. 39, 1929, V., vol. II, p. 53.)

This British view would not merely deny territorial waters for artificial structures but also certain rocks and banks.

The German reply gave a different point of view:

> The German Government considers that the geographical notion of an "island", which is taken as the basis in the preparation of maritime charts, covers all the characteristics of a *natural island;* any land which emerges from the sea and is dry at the level adopted in the chart must therefore be regarded as a natural island. The claim occasionally advanced that anchored buoys, and in particular lightships, should be regarded as "islands" would seem to be indefensible. It should therefore be laid down that *artificial islands* (artificial constructions)

should be assimilated to natural islands, provided that they rest on the sea bottom and have human inhabitants. (Ibid., p. 52.)

The German reply accordingly assimilates inhabited artificial constructions resting on the sea bottom to natural islands.

Denmark introduces certain conditions as to the extension of jurisdiction by artificial structures.

In determining the extent of the territorial waters around the coast, account is also taken of islands and reefs, as has been stated in paragraph IV(a). The same rule applies to artificial islands, lighthouses, etc., when determining the breadth of the territorial belt towards the open sea.

Where the territorial waters of two states are in contact, neither of them would be entitled to modify the existing delimitation to the prejudice of the other, by the construction of artificial islands, lighthouses, etc. (Ibid., p. 52.)

The Netherlands proposed the following:

an island should be understood to be any natural or artificial elevation of the sea bottom above the surface of the sea at low tide. (Ibid., p. 53.)

This point of view does not distinguish between natural and artificial elevations provided that they are exposed at low tide.

Rumania went further in its inclusive categories, saying,

by an island should be understood a land surface, rocky or otherwise, covered or not covered by water, connected or unconnected with the continent, over which it is impossible to navigate. (Ibid., p. 53.)

The Committee in preparing the Basis for Discussion, in view of the replies, made no reference as to artificial structures but formulated the following:

In order that an island may have its own territorial waters, it is necessary that it should be permanently above the level of high tide.

In order that an island lying within the territorial waters of another island or of the mainland may be taken into account in determining the belt of such territorial waters, it is sufficient for the island to be above water at low tide. (Ibid., p. 54.)

The result of the consideration by the Second Commission of the Conference of 1930 was:

Every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above high-water mark.

OBSERVATIONS.

The definition of the term "island" does not exclude artificial islands, provided these are true portions of the territory and not merely floating works, anchored buoys, etc. The case of an artificial island erected near to the line of demarcation between the territorial waters of two countries is reserved. (League of Nations Documents, C. 230. M. 117. 1930. V., p. 13.)

This statement does not make clear what would be the attitude upon artificial islands in general, but merely makes somewhat indefinite references to islands, "true portions of the territory."

Lighthouses, 1893.—In the Argument of the United States in the Fur Seal Arbitration, 1893, a question was incidentally raised in regard to lighthouses.

If a light-house were erected by a nation in waters outside of the three-mile line, for the benefit of its own commerce and that of the world, if some pursuit for gain on the adjacent high sea should be discovered which would obscure the light or endanger the light-house or the lives of its inmates, would that Government be defenseless? (9 Fur Seal Arbitration, Argument of the United States, p. 176.)

Sir Charles Russell referring to this and to questions raised as he discussed the point in his oral argument said:

Well, it is a very difficult case to realize what is really meant by that. For instance, I cannot quite realize how a pursuit of fishing on the high sea could, except by some stretch of imagination of which I am not capable, require the obscurity of the light of a light-house, or endanger the light-house or the lives of its inmates; but I wish to point out that I think my friend has, for the moment forgotten, that if a light-house is built upon a rock or upon piles driven into the bed of the sea, it becomes, as far as that light-house is concerned, part of the territory of the nation which has erected it, and, as part of the territory of the nation which has erected it, it has, incident to it, all the rights that belong to the protection of territory—no more and no less.

Mr. PHELPS. If it should be five miles out,

Sir CHARLES RUSSELL. Certainly, undoubtedly. The most important light houses in the world are outside the 3 mile limit.

Lord HANNEN. The great Eddystone Light-house, 14 miles off the land, is built on the bed of a rock.

Sir CHARLES RUSSELL. That point has never been doubted; and if it were there is ample authority to support it. The right to acquire by the construction of a light-house on a rock in mid-ocean a territorial right in respect of the space so occupied is undoubted; and therefore I answer my friend's case by saying that ordinary territorial law would apply to it—there is no reason why any different territorial law should apply.

Then my friend proceeds:

"Lord Chief Justice Cockburn answers this inquiry in the case of *Queen* v. *Keyn* above cited (p. 198) when he declares that such encroachments upon the high sea would form a part of the defence of a country, and 'come within the principle that a nation may do what is necessary for the protection of its own territory.'"

The passage which I conceive my friend was referring to, is a passage which, like that from Azuni, requires, in order to understand it, the whole passage to be read. I am reading now from page 58 of a printed report of the Judgment of Lord Chief Justice Cockburn.

"It does not appear to me that the argument for the prosecution is advanced by reference to encroachments on the sea, in the way of harbours, piers, break-waters, light houses, and the like, even when projected into the open sea, or of forts erected in it, as is the case in the Solent. Where the sea, or the bed on which it rests, can be physically occupied permanently, it may be made subject to occupation in the same manner as unoccupied territory. In point of fact, such encroachments are generally made for the benefit of the navigation; and are therefore readily acquiesced in. Or they are for the purposes of defence, and come within the principle that a nation may do what is necessary for the protection of its own territory. Whether if an encroachment on the sea were such as to obstruct the navigation, to the ships of other nations, it would not amount to a just cause of complaint, as inconsistent with international rights, might, if the case arose, be deserving of serious consideration. That such encroachments are occasionally made seems to me to fall very far short of establishing such an exclusive property in the littoral sea as that, in the absence of legislation, it can be treated, to all intents and purposes, as part of the realm."

In other words, it defends and justifies the taking possession of a certain part of the sea, and permanently occupying it for the purpose of erecting light-houses. (13 Fur Seal Arbitration, Proceedings, p. 337.)

Discussion of 1893 attitude.—The statement of Sir Charles Russell has been held by some to support a claim to the extension of maritime jurisdiction by the erection of a lighthouse or other structure in the high sea. Sir Charles was probably not giving special attention to this aspect of the question, but his remarks strictly construed, and any statement in regard to fundamental rights must be strictly construed, would scarcely warrant such construction. What Sir Charles said was that,

> it (the light-house) becomes, as far as that lighthouse is concerned, part of the territory of the nation which has erected it, and, as part of the territory of the nation which has erected it, it has, incident to it, all the rights that belongs to the protection of territory—no more and no less.

and later he says, in reply to a question—

> I answer my friend's case by saying that ordinary territorial law would apply to it—there is no reason why any different territorial law should apply.

This seems merely to affirm that the lighthouse itself is under the territorial jurisdiction and not to imply an extension of maritime jurisdiction.

Westlake's opinion.—Referring to this statement of Sir Charles Russell in his discussion of territorial waters, Professor Westlake said:

> The area of the land on which a strip of littoral sea is dependent is of no consequence in principle. Guns might be planted on a small island, and we presume that even in practice an island, without reference to its actual means of control over the neighbouring water, carries the sovereignty over the same width of the latter all round it as a piece of mainland belonging to the same state would carry. But an extreme case may be put of something which can scarcely be called an island. "If," Sir Charles Russell said when arguing in the Behring sea arbitration, "a lighthouse is built upon a rock or upon piles driven into the bed of the sea, it becomes as far as that lighthouse is concerned part of the territory of the nation which has erected it, and, as part of the territory of the nation which has erected it, it has incident to it all the rights that belong to the protection of territory—no more and no less." It is doubtful from the context whether the eminent

advocate meant by this to claim more for the lighthouse in its territorial character than immunity from violation and injury, of course together with the exclusive authority and jurisdiction of its state. It would be difficult to admit that a mere rock and building, incapable of being so armed as really to control the neighbouring sea, could be made the source of a presumed occupation of it converting a large tract into territorial water. It might however be fair to claim an exclusive right of fishing so near the spot that, without the light, fishing there would have been too dangerous to be practicable. (International Law, part I, p. 186.)

Professor Westlake's doubt as to the exclusive right to fishing may be arguable, but if the lighthouse has been constructed for the purpose of security to local fisheries, claims might be made accordingly, even though such a contention of exclusive right does not seem to have been made in case of lightships.

Later opinion.—While in the last edition of Oppenheim's International Law as revised by himself there is no comment upon Sir Charles Russell's statement, there is in the Roxburgh (third edition) edition of 1920 a reference to this statement, which is somewhat abbreviated in the edition of 1928 prepared by Dr. McNair, as follows:

Since the most important lighthouses are built outside the maritime belt of the littoral States, the question arises whether a State can claim a maritime belt around its lighthouses in the open sea—a question which Sir Charles Russell, the British Attorney-General, in the *Behring Sea Seal Fisheries* case answered in the affirmative. It is tempting to compare such lighthouses with islands, and argue in favour of a maritime belt around them; but I believe that such an identification is misleading, and that lighthouses must be treated on the same lines as anchored lightships. Just as a State may not claim sovereignty over a maritime belt around an anchored lightship, so it may not make such a claim in the case of a lighthouse in the open sea. (1 International Law, 4th ed., p. 403.)

Dr. M. F. Lindley, writing in 1925 and also referring to Sir Charles Russell's remarks, says:

Now, considering first the question of sovereignty over the surrounding water, although we agree with Westlake's conclusion on

this point, it appears to us to rest upon other grounds. A control sufficient to render the occupation effective could, apparently, be exercised by placing an armed vessel upon the part of the sea in question, so that the fact that it may be impossible to fortify the lighthouse would not, by itself, be sufficient to render the surrounding water inappropriable. The principle underlying this case appears to be the same as that governing the one we have just considered, and if a rock or barren island is not occupied for its own sake, but merely to facilitate fishing and navigation in the surrounding ocean, it does not appear that this would be a sufficient justification for extending the sovereignty of the occupying State over those waters.

Secondly, in regard to the exclusive right of fishing, it is difficult to see how the mere building of the lighthouse, which is not sufficient to render the surrounding waters territorial, takes this case out of the operation of the principle underlying the decision in the Behring Sea Arbitration. Although the fishing off the Seven Stones at the mouth of the Bristol Channel would be dangerous without the lightship which Trinity House maintains there, no exclusive right in the fishing is claimed for British fishermen, and there appears to be no difference in principle between establishing a lightship upon a barren rock or upon piles driven into the sea bottom. The case appears to be one to be dealt with by Convention between the States interested, for which precedents are not lacking. (Acquisition and Government of Backward Territory in International Law, p. 67.)

Beacons.—Beacons, buoys, and markers of various types are now common in parts of the sea where there are dangerous reefs and shoals, but it would not be claimed that these extend the coastline of the state which may place these aids to navigation. Indeed they are not infrequently changed in location, usually with notice to mariners without any contention that the jurisdiction of the state making the change has relocated its territorial waters jurisdiction. Changing currents, shoals, etc., may make necessary the marking of new channels, but not the extension or modification of the jurisdiction of the state undertaking the marking of the channel. It may be affirmed that the placing of beacons, buoys, etc., on submerged locations does not extend the marginal sea jurisdiction but the jurisdiction over the marker itself

is in the state or states locating and caring for its upkeep.

Case of United States v. *Henning, 1925.*—The question as to whether a beacon built upon a submerged reef would be the point from which the coastline should be measured was raised in the case of the *United States* v. *Henning et al.* in 1925. In the decision it was said:

> The point where the *Frances E.* was anchored was 12 miles west of Sea Horse Reef beacon on the west coast of Florida and about 16 miles west of the coast of Florida. This beacon is a structure built on a shallow reef, and projecting up out of the water, but the reef is wholly under water.
>
> It is contended by the government that this beacon is under the terms of section 3 of article 2 of this treaty (43 Stat. 176), to be treated as the point from which the one hour's time is to be estimated. I cannot concede this construction. The language is: "The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions, than can be traversed in one hour."
>
> The beacon certainly is a possession of the United States, but these words properly mean and must be held to mean as if written the distance "from the coast of the United States, the coast of its territories, or the coast of its possessions", for it was from the coast the time was to be measured. The words undoubtedly had reference to such territories or possessions as Porto Rico and Hawaii. It certainly had no reference to marine structures erected in the water and having no coast. (*United States* v. *Henning et al.*, (1925), 7 F. (2d) 488, 489.)

While the decision in this case was reversed in 1926 (13 F. (2d) 74), probably the same position as to the nature of jurisdiction as dependent upon the beacon would be maintained.

Status of air.—The Convention of 1919 relating to air navigation which is generally accepted provides in its first article that "the contracting states recognize that every state has complete and exclusive sovereignty in the air space above its territory and territorial waters", and this principle has been embodied in other conventions.

There has been some debate as to whether the air over the high seas is *res nullius* or *res communis*. The air

above the sea would follow the nature of the sea. Practice and opinion seems to favor the *res communis* doctrine under which the high sea may be used for navigation, but may not be exclusively appropriated. There arises the question as to whether states having no seacoast may have a right to use the sea equally with states having seacoast. A considerable degree of equality has been admitted in the right of states having no seacoast to issue documents and certificates to vessels under their flags "in conformity with the general practice observed in the principal maritime states." (Art. 273. Treaty of Peace with Germany, June 28, 1919; see also Barcelona Declaration, April 20, 1921, 1924 Naval War College, Int. Law Documents, p. 83; 7 League of Nations Treaty Series, 1921, p. 74.) It is argued that if such states have a right to fly their flags on vessels, then they must have rights of coast states in the air above the high seas, which seems difficult to deny.

Liability for use.—While a part of the field of international law of aviation was covered in the Convention on the Regulation of Aerial Navigation, October 13, 1919, the field of private law did not receive corresponding attention as regards foreign aircraft. In 1925 the French Government took steps toward calling a conference for considering the private international law of aviation and the *Comité International Technique d'Experts Juridiques Aériens* came into existence in 1927. This Committee has drawn up conventions for consideration by international conferences.

In the proposed conventions the fact that the subjacent area with its population and property does not voluntarily come into relation to an aircraft is generally recognized and the responsibility for damage is placed upon the aircraft. This liability is affirmed in the latest proposed convention even though there was no intentional culpability on the part of the aircraft. Of course damage due to a fault of the injured party is excepted,

e.g., if a person is trespassing on a landing field reserved for aircraft.

It is evident that while there may be analogies between air and marine navigation, and air and land transportation, yet there are many aspects which are not analogous. It is true that there may be analogies between craft lighter than water and craft lighter than air, but the analogies are limited in scope. Wheel vehicles responsive to the force of gravity are only in small measure comparable to winged or motor-driven vehicles counteracting some of the forces to which the wheeled vehicles respond.

International significance.—The international significance of aerial navigation is evident in the growing network of treaties and conventions particularly since 1919. The proposition of France to the Disarmament Conference in 1932 as to the internationalization of civil aviation emphasized another aspect and other possibilities of aviation. Whether the French proposition would result as prophesied is doubted by some. Certainly the consequences are not as simple as some seem to believe.

Definitions.—In laws and conventions definitions have been adopted but these are not yet entirely uniform. In general, the term "aircraft" includes any contrivance capable of aerial flight and would cover flying machines, balloons, gliders, etc., constructed for flight but not such contrivances as parachutes and projectiles.

The term "air space" is usually held to be the space above any specified area and national air space is that above the area over which a state exercises jurisdiction.

Detailed regulations as to rules of the road, signals, markings, landing procedure, personnel, etc., are already common. International conventions on these matters are now numerous and usually aim to facilitate communication. Within the United States it has been necessary that many Federal regulations should be made as to aerial navigation as a part of interstate commerce, even to the

modification of State regulations which might hamper interstate flying. The recognition of the principle which has thus been applied in American interstate aviation may similarly be essential in international aviation.

Rules for air navigation.—Thus far detailed rules for air navigation have been largely national, though some conventional agreements have been made both bilateral and multilateral.

Some of the national legislation has been detailed in specifications and regulations. Nearly all contain some definitions of which the Chilean Decree of May 15, 1931, is a type. This decree defines " aerodrome " as " any area of land or water specially arranged for the accommodation, departure, or landing of aircraft." (Int. Commission for Air Navigation, Bulletin of Information, no. 526, art. 34, p. 7.)

Portuguese decree, October 25, 1930.—In 1930 Portugal issued a decree promulgating detailed rules in regard to aerial navigation. These rules which are full and classified defined aircraft. By " aerodrome " the rules (article 7) understand any land or water surface set apart for the taking off or arrival of aircraft. At an airport, as distinguished from an " aerodrome ", there would be also additional facilities for revenue and other formalities as in a maritime port.

Conventional regulation.—Early projects in regard to regulation and control of aerial flight looked to uniform international regulation. No such hope has been realized. More than 30 bilateral conventions have, however, embodied differing rules, but as yet these are not so unlike that they cannot be reconciled.

Most of the conventions recognize the sovereignty of the state in the air above its jurisdiction, which includes its territorial sea. At the same time there is an attempt to maintain freedom of innocent passage though not all aircraft are granted passage even in time of peace. In general, equality of rights is conceded to all states. Reg-

istration, etc., is to a large degree standardized. Frequent conferences are aiming at greater uniformity as air lines spread over more extended areas.

Treaties upon aviation.—In recent years many treaties relating to air navigation have been concluded. These vary in their provisions but are usually reciprocal in granting privilege of flight in time of peace for private aircraft of the parties.

An air-navigation arrangement between the United States and the Netherlands, of which notes of agreement were exchanged, November 16, 1932, contains the following:

ARTICLE 1

For the purpose of the present arrangement (*a*) the term "territory" shall be understood to mean the United States of America, the Netherlands and likewise possessions, territories, and colonies over which they respectively exercise jurisdiction, including territory over sea and territorial waters; and (*b*) the term "aircraft" shall be understood to embrace private aircraft and commercial aircraft including state aircraft used exclusively for commercial purposes.

ARTICLE 2

(1) Each of the Parties to this arrangement undertakes in time of peace to grant liberty of innocent passage above its territory to the aircraft of the other party, provided that the conditions set forth in the present arrangement are observed.

(2) It is, however, agreed that the establishment and operation of regular air routes by an air transport company of one of the Parties within the territory of the other Party or across the said territory, with or without intermediary landing, shall be subject to the prior consent of the other Party given on condition of reciprocity and at the request of the Party whose nationality the air transport company possesses.

(3) Each Party to this arrangement agrees that its consent for operations over its territory by air transport companies of the other Party may not be refused on unreasonable or arbitrary grounds. The consent can be made subject to special regulations relating to aerial safety and public order.

(4) Each of the Parties to this arrangement may reserve to its own aircraft, air commerce between any two points neither of

which is in a foreign country. Each Party may also reserve to its own aircraft pleasure or touring flights starting from an aerodrome in its territory and returning to the same aerodrome for which a transportation charge would be made. (Department of State, Press Releases, Publication No. 409, Dec. 17, 1932, p. 434.)

Regulation of air service.—With more than 100,000 miles of air lines in regular operation, and as some of these make easily accessible points formerly difficult of access, states have been constrained to adapt their laws to these new conditions. This has been done in part by domestic legislation and in part by international agreement. For the carriage of foreign mail, international arrangements have become necessary. The results of national surveys, meteorological data, and other information has been supplied by one state to others as well as much other data which might be of value in planning air service. The use of the radio has added much to the efficiency and safety of this service.

The regulations thus far adopted and those proposed show conclusively that the rules for navigation at sea do not and cannot apply to any great extent to aviation. It is unfortunate for that reason that so many maritime terms have crept into the language of aviation, for analogies in fact are often remote.

A new set of problems may arise in regard to hydroplanes, if their range of flight is confined to the air above the sea. Questions have been raised as to whether these are not in all respects to be treated as maritime vessels as respects belligerent and as respects neutral rights. Questions have also been raised as to whether when on the water maritime law should apply and when in the air aerial law should apply. Hydroplanes are, however, except for the place of coming to a stop, so nearly identical to aircraft which alights on land that there is no reason entitling them to different treatment.

Report on air armaments, 1932.—In determining the treatment of aircraft in the Disarmament Conference in

1932, it was necessary to have a definite idea as to the aid and service which the different types might render. In a resolution of April 22, 1932, the Air Commission was asked by the General Commission the following questions:

What are the air armaments:

(*a*) Whose character is the most specifically offensive;

(*b*) Which are the most efficacious against national defence;

(*c*) Which are the most threatening to civilians?

Although it was made clear in the discussions in the Air Commission that the offensiveness of the air armaments, their efficacy against national defence, and the threat that they represent to civilians vary considerably on account of the wide differences in the geographical position of different countries, the location of their vital centres, and the state of their anti-aircraft defences, and that any qualitative question in connection with air armaments is closely bound up with quantitative considerations, the Commission found it possible to set down certain general conclusions, which form Part I of this report. The Commission also undertook a technical study of the efficacy and the use of air armaments. The results of this study form Part II of the present report. Part III contains several comments in regard to Parts I and II, and Part IV contains statements by various delegations, with an introduction.

Part I.

These conclusions are as follows:

I. (*a*) All air armaments can be used to some extent for offensive purposes, without prejudice to the question of their defensive uses.

If used in time of peace for a sudden and unprovoked attack, air armaments assume a particularly offensive character. In effect, before the State victim of the aggression can take the defensive measures demanded by the situation, or before the League of Nations or States not involved in the conflict could undertake preventive or mediatory action, the aggressor State might in certain cases be able rapidly to obtain military or psychological results, such as would render difficult either the cessation of hostilities or the re-establishment of peace.

(*b*) Civil aircraft, to the extent that they might be incorporated into the armed force of a State, could in varying degrees subserve miliary ends.

(*c*) Independently of the offensive character which air armaments may derive from their use, their capacity for offensive action depends on certain of their constructional characteristics.

3628—34——6

(*d*) The possibilities of offensive action of aeroplanes carried by aircraft-carriers or warships equipped with landing-platforms (or landing-decks) must be regarded as being increased by the mobility of the vessels which carry them.

(*e*) The capacity for offensive action of air armaments resulting from such constructional characteristics should first be considered from the point of view of the efficacy of such armaments against national defence, and secondly from the point of view of the threat offered thereby to the civilian population.

EFFICACY AGAINST NATIONAL DEFENCE

II. (*a*) The aircraft forming a part of the air armaments of a country that may be regarded as most efficacious against national defence are those which are capable of the most effective direct action by the dropping or launching of means of warfare of any kind.

(*b*) The efficacy against national defence of an aircraft forming part of such armaments, and considered individually, depends upon its useful load and its capability of arriving at its objective.

(*c*) The efficacy against national defence of means of warfare of every kind launched from the air depends upon the material effect which they are capable of producing.

THREAT TO CIVIL POPULATION

III. (*a*) The aircraft forming part of the air armaments of a country which can be regarded as the most threatening to the civil population are those which are capable of the most effective direct action by the dropping or launching of means of warfare of any kind; this efficacy depends primarily upon the nature of the means of warfare employed and the manner in which they are employed.

(*b*) The degree of threat to the civil population represented by an aircraft forming part of those armaments, and considered individually, is in proportion to its useful load and its capability of arriving at its objective.

(*c*) The means of warfare, intended to be dropped from the air, which are the most threatening to the civil population are those which, considered individually, produce the most extended action, the greatest moral or material effect; that is to say, those which are the most capable of killing, wounding and immobilising the inhabitants of centres of civil population or of demoralising them, so far as concerns immediate consequences, and so far as concerns future consequences, of impairing the vitality of human

beings. Among these means the Commission specially mentions poisonous gases, bacteria and incendiary and explosive appliances.

IV. The useful load of aircraft and their capability of arriving at their objective are determined by a large number of variable factors. Where useful load is concerned, the Air Commission has noted among these variable factors, for purposes of examination, the unladen weight, the horsepower and the wing area for aeroplanes, the volume and the horsepower for dirigibles. (League of Nations Documents. Series IX, Disarmament, IX, 48. No. Conf. D. 123, p. 1.)

In part II the technical study showed that the " offensive character of air armaments can not be determined arbitrarily ", " depends upon the objectives ", etc.

Part III contained comments upon the conclusions embodied in part I.

The United States with Portugal cast votes against part I, conclusion I (*d*). There were 16 affirmative votes. The delegation of the United States made the following declaration:

The delegation of the United States considers that the statement in Paragraph I (*d*) as to the increased possibility of offensive action of ship-based aircraft is inappropriate for inclusion in a report which deals with aircraft generally and which does not otherwise discuss specific types of aircraft of the influence of the base of action upon their offensive capabilities.

" One of the tests already contained in the report is that of capability of arriving at an objective. Thus the mobility feature of ship-based aircraft if already taken into account and any further reference in the report which might give the impression that individual ship-based aircraft are more specifically offensive than individual aircraft taking off from bases close to land frontiers is misleading."

The Portuguese delegation associated itself with this declaration, and the United Kingdom delegation stated that it shared the views therein expressed. (Ibid., p. 6.)

Part IV, which set forth national opinions, gave evidence of wide differences of view ranging from that of states which had no air forces to that of states maintaining large air forces.

Terminology.—The terminology to designate a landing place for aircraft on the high sea has been discussed from

time to time and various terms have been proposed. The following have been among the many suggestions: "floating island", "marine airport", "airport in the high sea", "marine aerodrome", etc., but the term "seadrome", while not ideal, has the advantage of being a single word of which the parts are associated with the location and with the use.

Need of marine aerodromes.—There has been a growing recognition that aerodromes would be needed at sea to a degree somewhat comparable to the need on land if transoceanic aviation is to develop rapidly. The transoceanic flights have in their early attempts generally been of a spectacular character. For many reasons such flights have involved great risk and expense. Nonstop flights are at present regarded as noneconomic undertakings. If transoceanic aviation is to become common it seems essential that seadromes be located.

Importance of seadromes.—The proposals for locating seadromes have been primarily based on arguments for securing and increasing oversea aviation. It has been estimated that even a moderate number of seadromes in the Atlantic Ocean would increase trans-Atlantic aviation 100 percent. These seadromes, presumably equipped for landing, taking off, refueling, or repairing, might likewise be of great service to submarines and other vessels.

The location of seadromes would be a matter of concern to all states if these are to be under national control as the strategic conditions of maritime states may be greatly changed by such stations. It is entirely possible that commercial routes would indicate one location while strategic reasons would indicate another. Manifestly also the high seas may not be appropriated to the exclusive use of any state or corporation.

Types of proposals.—Manifestly high sea aerodromes, if established, must be under responsible control. That such aids to aviation should be subject to the vagaries

of private control, operation, and competition, must be considered undesirable. That it should be permitted to any state to establish a seadrome off the coast of another state for the purpose of carrying on hostilities against it would seem unreasonable. These and other reasons have led to propositions varying in nature. It has been proposed that seadromes should be assimilated to islands but the better opinion seems to be that seadromes are not to be assimilated to islands. Some have wished the complete control to be vested in the state of the constructor. Such a proposition has been denied as impracticable by others. Representatives of nonmaritime states have claimed the same right to construct seadromes as states having seacoast. This has been denied by some on the ground that an inland state would have no right of access to the sea, except by convention or grace, of coast states. It has been suggested that the League of Nations be entrusted with the administration of the system of seadromes but representatives of nonmembers have raised objections. In general, proposals have been met with counter proposals and objections but progress has been made in clarification of ideas.

At the Disarmament Conference at Geneva, in 1932, the proposals ranged from that of complete abolition of all military aviation and internationalization of all civil aviation to a gradual reduction of air forces with the establishing of rules for their control and operation. The proposal to transform air forces into an international police was favored by some states.

The international action of civil aviation received much attention at the Disarmament Conference. The Preparatory Commission of the League of Nations in the Draft Convention had introduced the following articles:

ART. 25. The number and total horse-power of the aeroplanes, capable of use in war, in commission and in immediate reserve in the land, sea and air armed forces of each of the High Con-

tracting Parties shall not exceed the figures laid down for such Party in the corresponding columns of Table I annexed to this Chapter.

The number and total horse-power of the aeroplanes, capable of use in war, in commission and in immediate reserve in the land, sea and air formations organised on a military basis of each of the High Contracting Parties shall not exceed the figures laid down for such Party in the corresponding columns of Table II annexed to this Chapter.

ART. 26. The number, total horse-power and total volume of dirigibles, capable of use in war, in commission in the land, sea and air armed forces of each of the High Contracting Parties shall not exceed the figures laid down for such Party in the corresponding columns of Table II annexed to this Chapter.

The number, total horse-power and total volume of dirigibles capable of use in war, in commission in the land, sea and air formations organised on a military basis of each of the High Contracting Parties shall not exceed the figures laid down for such Party in the corresponding columns of Table IV annexed to this Chapter.

ART. 27. Horse-power shall be measured according to the following rules * * *

The volume of dirigibles shall be expressed in cubic metres.

ART. 28.

1. The High Contracting Parties shall refrain from prescribing the embodiment of military features in the construction of civil aviation material, so that this material may be constructed for purely civil purposes, more particularly with a view to providing the greatest possible measure of security and the most economic return. No preparations shall be made in civil aircraft in time of peace for the installation of warlike armaments for the purpose of converting such aircraft into military aircraft.

2. The High Contracting Parties undertake not to require civil aviation enterprises to employ personnel specially trained for military purposes. They undertake to authorise only as a provisional and temporary measure the seconding of personnel to, and the employment of military aviation material in, civil aviation undertakings. Any such personnel or military material which may thus be employed in civil aviation of whatever nature shall be included in the limitation applicable to the High Contracting Party concerned in virtue of Part I, or Articles 25 and 26, of the present Convention, as the case may be.

3. The High Contracting Parties undertake not to subsidise, directly or indirectly, air lines principally established for military

purposes instead of being established for economic, administrative or social purposes.

4. The High Contracting Parties undertake to encourage as far as possible the conclusion of economic agreements between civil aviation undertakings in the different countries and to confer together to this end. (League of Nations Publication IX. Disarmament, 1930. IX. 8. No. C. 687 M. 288., p. 14.)

Evident desiderata.—It is evident that high-sea aerodromes will be essential to convenient and safe transoceanic aviation. These should have a degree of uniform character and administration. They should, when under neutral flags, not increase the war risk of states. High-sea aerodromes should be open to all aircraft on equal terms. The threat of or existence of hostilities should not affect the service of the aerodromes. These should not be fortified or adapted for war use. Exclusive control should not be in any one state though a degree of national control may be essential in order to secure the necessary investment of public or of private capital. It may be easier starting *de novo* to obtain satisfactory agreements for the construction and maintenance of high-sea aerodromes than would be possible if many such structures were already in existence. The analogy is closer to the status of a lightship than to that of an island.

Seadromes not ships.—If a seadrome could be put in the category of ships or vessels, the law applicable would be fairly well defined. It is true there may be certain analogies to a ship used as an aircraft carrier, but the aircraft carrier is by its very nature constructed for the purpose of navigation which is a common criterion in distinguishing ships from other structures. The prime value of a seadrome would be permanence of location in order that aircraft could plan their voyages with reference to its location. In the case of *Cope* v. *Vallette Dry Dock Company*, *1887*, which involved a suit for salvage of a dry dock, Mr. Justice Bradley, who ren-

dered the decision in the Supreme Court of the United States, said:

> We have no hesitation in saying that the decree of the Circuit Court was right. A fixed structure, such as this drydock is, not used for the purpose of navigation, is not a subject of salvage service, any more than is a wharf or a warehouse when projecting into or upon the water. The fact that it floats on the water does not make it a ship or vessel, and no structure that is not a ship or vessel is a subject of salvage. A ferry bridge is generally a floating structure, hinged or chained to a wharf. This might be the subject of salvage as well as a drydock. A sailor's floating bethel, or meeting house, moored to a wharf, and kept in place by a paling of surrounding piles, is in the same category. It can hardly be contended that such a structure is susceptible of salvage service (119 U.S. 625, 627.)

Some have suggested that seadromes be treated as ships and be assimilitated to aircraft carriers.

In the case of *Evansville Co.* v. *Chero Cola Co., 1926*, the court considered whether a wharf boat, not capable of use as a means of transportation could be a vessel and said,

> The only question presented is whether appellant's wharfboat was a "vessel" at the time it sank. It was an aid to river traffic, but it was not used to carry freight from one place to another. It was not practically capable of being used as a means of transportation. It served at Evansville as an office warehouse and wharf, and was not taken from place to place. The connections with the water, electric light and telephone systems of the city evidence a permanent location. It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land. (271 U.S. 19, 22.)

From these and other cases, it is evident that a seadrome even when located in the high sea would not fall into the category of ships which would, if neutral, be liable to visit and search and to presentation before a prize court.

Seadromes in time of war.—The peace-time status of seadromes on the high sea seems, in the opinion of the majority of those who have given serious consideration

to the matter, to be one in which the jurisdiction in the thing itself is in the state to which the seadrome belongs, or in the state whose subject established the seadrome.

Questions may be raised as to the right of a state or of a citizen to establish a seadrome on the high sea. It has been proposed by some that this question be left to the League of Nations, by others that it be settled by some sort of an international conference or committee, and by others that there be no regulation. Plans for neutralization have met with the criticism that neutralization gives no guarantee in the time of war in which the neutralizing powers are engaged and by the further criticism that neutralization might provide only for a time of war which might never occur.

Internationalization proposals have met with more support as visualizing the time of peace as well as of war and as based upon general rather than special considerations. The argument may be put forward that, the high sea being *res communis*, any use of the high sea other than that sanctioned by generally accepted practice should be by international authorization and under international control. This may be supported by the fact that seadromes may be a risk to navigation, that seadromes may modify the conditions of established commercial and other relations, that seadromes may be of capital importance in determining strategic plans.

The arguments for internationalization of seadromes seem most convincing, particularly as the further use of the high sea should be for the general international good. If the principle of internationalization be accepted, the seadrome should not be open to any war use during hostilities.

If internationalization is not adopted as a principle and seadromes are nationalized, neutral seadromes should be closed to war use and the treatment of belligerent seadromes should be made known in advance by proclamations in order that neutral aircraft may not be subject to unknown peril.

National control introduces many problems as to responsibility and liability in the use of seadromes. As the seadromes are in the high sea, the states of the world may claim an interest above that in ordinary national property as the locating of the seadrome may be regarded as tolerated by grace on account of its general service, which service may not be abandoned or made impossible by national exigencies. Whether a neutral seadrome on the high sea may be visited and searched, and then treated according to what the visit and search seemed to disclose, is to restore a type of quarter-deck court that has been usually viewed with disfavor by courts and also by military officers concerned as being foreign to their duties and profession. If neutral seadromes might be seized and occupied by belligerents on the ground of assumed nonfulfillment of the laws of neutrality, many abuses may arise which might involve serious legal and other complications.

While there has been considerable attention given to the status of landing stations for aircraft at sea in time of peace, there has been comparatively little attention given to their status in time of war. Some European conferences upon aviation laws have given incidental consideration to certain aspects of this matter. In recent years many have thrown aside the laws of war as being negligible on the premise that there would be no more war, but, however desired this may be, a warless world is not yet assured, and under these circumstances war, if it comes, should be regulated to attain its ends with the least possible loss of life and property. So long as there is risk of war, it is evident that seadromes may be exceptionally exposed to its risks whether the seadrome be under a belligerent or under a neutral flag.

If the seadrome be under a belligerent flag in absence of special regulations to the contrary, it would be liable to treatment as enemy property at sea. During the Spanish-American War lighthouses were not regarded as in-

violable, and during the World War, 1914–18, lighthouses and lights were under national control. Belligerents extinguished both their own and opponent's lights, though not aiming attacks against opponent's lights as such. Neutrals also gave notice of special regulations. Buoys and buoy markings were also sometimes changed. It is not to be expected that a state would maintain aids to facilitate the movements against itself by its enemy forces, and a neutral state may wish to take measures to avoid violations of its neutrality.

The direct risk from the existence of seadromes might be much greater than from lighthouses or lightships. If a state can assume full and unregulated jurisdiction over a seadrome which it or its subjects has constructed in the high seas, then the seadrome may be treated as belligerent or neutral, according as the state is belligerent or neutral. Indeed the construction and locating of seadromes might under such national control become a matter of strategic planning for states and under the present tendency to permit states which have no seacoast to locate airports on the high sea, might introduce novel problems of offense and defense.

Artificial extensions of land.—The extension of territory by construction of wharves, dykes, breakwaters, etc., along a river is permissible so long as it works no damage to other riparian states. If the boundary line is already established by convention, it remains the same; and if the boundary has been regarded as the thalweg, it similarly remains unchanged.

Artificial extensions of land into the high sea without causing damage to another state have been regarded as legitimate use of the sea. So far as the sea belongs to no state, there is no party that can claim to be damaged.

Indeed, it may be maintained that with few exceptions, extensions of the land into the high sea are of advantage to other states, because the purpose would ordinarily be with view to greater convenience or safety in the use of

the sea by all. Even extensions like sea walls for the purpose of prevention of the washing away of land would be a relatively economic advantage, as thereby the land would be preserved for possible use of man. It would rarely be the case that the extension of land into the high sea would be solely to the advantage of the state primarily concerned.

These extensions of land area at the same time extend territorial and maritime jurisdiction, but of course not to an extent to impair the rights of other states. If a breakwater or other land is extended outward from the shore beyond the original 3-mile limit, the maritime jurisdiction is extended similarly. In general this gives rise to no complications; but if the breakwater were extended into a relatively narrow strait between two states, the state upon the opposite side might have ground for objection.

Résumé.—Whether seadromes will be essential to the further development of transoceanic flight, or whether the perfection of aircraft will make seadromes unnecessary, has been argued. It has usually been admitted that even if aircraft become much more fully perfected, there may be need for some seadromes in the high seas for special purposes.

Transoceanic flights will ordinarily be between states of different nationality and some international regulations and understandings will be needed. Such regulations and understandings are to a limited extent in existence and others are under consideration.

As the doctrine of the freedom of the seas has after centuries of struggle been generally recognized, there is reluctance to concede to any state in absence of specific agreement any extension of the maritime jurisdiction. National jurisdiction over lightships on the high seas and lighthouses built in the high seas upon submerged foundations has been tacitly admitted in time of peace, but later opinion limits jurisdiction to the lightship or

lighthouse itself, and maintains that the placing of either in the high sea does not automatically extend the jurisdiction of the state placing the lighthouse 3 miles out in all directions.

The filling in of the marginal sea outward from the coast has, however, been regarded as correspondingly extending the maritime jurisdiction outward in the sea provided this does not involve an impairing of the jurisdiction of any other state. While the filling in of an area about a lighthouse built in the high sea may be permitted so far as may be reasonably convenient and needful for the maintenance of the light, the jurisdiction of the state over the lighthouse is limited to this area. It would seem to be essential also that this national jurisdiction extend for the safe custody of the light both below and above this area.

Opinion seems to support the view that if national seadromes are permitted in the high seas, the national jurisdiction shall be limited to the seadrome and the space above and below and not to adjacent waters. Further, as the seadrome is permitted in the high sea as an aid to navigation in the time of peace, its use in time of war shall be limited to that purpose. If it is under neutral state jurisdiction, its function is restricted solely to the purpose for which it was placed and neutral protection in adjacent waters does not extend even to vessels which for purposes other than the upkeep of the seadrome are secured to the seadrome itself.

SOLUTION

(*a*) The visit and search of the neutral merchant vessel is lawful, as there is no territorial sea around the lighthouse built upon a submerged reef 14 miles from any coast. No protection, other than to assure the lawful exercise of the visit and search, should be given to the *Nagle*.

(*b*) The visit and search of the neutral merchant vessel is lawful, as there is no territorial sea around the landing station for aircraft built upon a submerged reef 20 miles from any land. No protection, other than to assure the lawful exercise of the visit and search, should be given by neutral vessels of war to the *Nagle*.

(*c*) The visit and search of the *Nagle* tied to an anchored landing station for aircraft of R is lawful, as there is no territorial sea around the landing station for aircraft 20 miles from any land. No protection, other than to assure the lawful exercise of the visit and search should be given to the *Nagle*.

(*d*) The visit and search of the neutral merchant vessel within 1 mile of a causeway built out from shore to a landing station for aircraft is not lawful, as the merchant vessel is within territorial sea and the vessel of war of R should afford protection against any violation of the neutrality of state R, and should protect the merchant vessel against any violation of its rights within these waters.

(*e*) All enemy aircraft are liable to capture if nonmilitary, or to attack if military, when not on or over the landing station mentioned in (*b*) or (*c*). Enemy aircraft may not be lawfully captured or attacked when within 3 miles of the causeway or landing station mentioned in (*d*) but should be interned.

Situation III

BOYCOTT

States X and Y are using force against each other but have made no declaration of war. States A, B, and C agree severally and jointly to boycott both X and Y until they cease to use force. The boycott has been proclaimed but no detailed instructions have been given to the navies.

(*a*) A cruiser of state A, the *Ajax*, meets a merchant vessel of state B, the *Banner*, apparently bound for a port of X. What should the *Ajax* do? Would it make any difference if the *Banner* had sailed before the boycott was proclaimed? Would a cruiser of B, the *Brook*, act in the same manner?

(*b*) A cruiser of state C, the *Crown*, meets a merchant vessel of state X bound for state B. What action may it take?

(*c*) The *Crown* later meets a merchant vessel of state D, the *Drone*, bound for state X. What action may the *Crown* take?

(*d*) What action may the cruisers of states A, B, and C take against a vessel of war of state X convoying merchant vessels of X, or convoying merchant vessels of states D, E, and F?

Solution III

(*a*) The *Ajax* should determine for what port the *Banner* is bound and if for a port of X or if uncertain, should send the *Banner* to the nearest port of A, B, or C.

If the *Banner* had sailed before the boycott was proclaimed, the *Banner* should be notified of the boycott and should be prohibited from entering any port of X.

The *Brook* should act in the same manner unless for special reasons the *Banner* should be sent to a port of B.

(*b*) The *Crown* should take such action as would make certain that the merchant vessel of X goes to a port of B or some port of A or C.

(*c*) The *Crown*, if assured of the nationality of the *Drone*, may take no action though the *Drone* may be kept from entering ports of X which are effectively closed.

(*d*) Merchant vessels of X or D, E and F bound out from X under convoy of vessel of war of X are free to proceed but when bound for X the cruisers of states A, B, and C may take action to prevent entrance of the vessels to ports which are effectively closed and may route or take vessels of X bound for X to ports of A, B, and C.

NOTES

Defining war.—War is an ancient method of settling differences. Accounts of wars are among the earliest records of human relations. Wars of extermination were even approved in some of the early sacred books and the deeds of great warriors became the bases for much of classic literature in most languages. Monuments to warriors appear in many cities and streets, and squares perpetuate their memories. Significant of a marked change in attitude is the tribute of general recognition given since 1918 to the "unknown soldier" in contrast with earlier practice of laudation of leaders whose names for various reasons had become well known.

With the changing attitude toward war, there came attempts to regulate the conduct of war and to fix its limits. The limitation to which the concept of war had come among advanced thinkers toward the end of the sixteenth century is indicated in the definition of Gentilis (1588) in which he said "war is a properly conducted contest of armed public forces." (De jure belli, Bk. 1, c. 2.) Ayala in 1581 had asserted as a fact that there was not safety "in arms without law and discipline any more

than in law without arms" (Westlake, translation, vol. II, p. V) not endorsing the formula "in time of war laws are silent." In succeeding centuries treatises upon the laws of war were common and it was recognized as an action "to which, from the nature of the thing and the absence of any common superior tribunal, nations are compelled to have recourse, in order to assert and vindicate their rights." (3 Phillimore, International Law, p. 49.)

With the growth of states and the increasing burden of war, rules for its conduct became more and more defined, and the demands of states, not concerned that they should so far as possible be free of the consequence of hostilities, further restricted action of belligerents.

The Hague Peace Conference of 1899, called on the initiative of the Czar of Russia, had in its agenda proposals for limitation of armament and for the regulation of the conduct of war. The Second Peace Conference at The Hague in 1907 elaborated the convention of 1899 in regard to war. The third convention of the Conference of 1907 "considering that it is important in order to ensure the maintenance of pacific relations, that hostilities should not commence without previous warning" and that "a state of war should be notified without delay to neutral powers", specifically recognized that hostilities between the signatories must not commence "Without previous and explicit warning", and that the existence of a state of war should not take effect as regards neutrals "until after the receipt of notification" unless it is "clearly established that they were in fact aware of the existence of a state of war."

Definite and explicit notifications were made during the World War, some of these even specified the day, hour, and minute at which the state of war would exist. Provisions were made as to the time when the state of war should be regarded as at an end. Thus it was evident that the previous uncertainty as to the period of

hostilities was no longer a question giving rise to difficulties such as had previously been common. The commencement was to be determined by declaration and not, as had sometimes been the case, and would be the case under the definition of Gentilis, by the actual "contest of the armed public forces", but by the declaration stating the moment when such contest might be regarded as lawful and when a state of war would be considered as existing. The implication was that lawful hostilities between states parties to the convention "should not commence without previous warning" as outlined.

War might, therefore, be defined after 1907 as "the relation which exists between states or between political entities when there may lawfully be what Gentilis in 1588 defined as 'a properly conducted contest of armed public forces.'" (Wilson and Tucker, International Law, 8th ed., p. 235.)

Measures short of war.—That states should have no differences which could not be settled by diplomatic negotiation seems beyond immediate hope of realization. In addition to arbitration and judicial methods, for many years measures of reprisal, embargo, nonintercourse, display or restricted use of force, and pacific blockade have been used and have been regarded as short of war, even though sometimes called nonamicable. Such measures of force or other pressure were often resorted to, particularly from the early days of the nineteenth century.

Measures short of war might be used by a neutral toward one or both belligerents when the neutral considered such measures essential to securing fair treatment.

During the World War by Act of Congress, September 8, 1916, the President of the United States was "authorized and empowered to withhold clearance" from vessels of a belligerent country denying American vessels or citizens "reciprocal liberty of commerce and equal liberty of trade." (39 U.S.Stat., p. 88, § 806.) An Act of 1887 had empowered the President to deny entrance

to the waters of the United States of Canadian vessels in case the rights of American fishermen were denied or abridged in Canadian waters. (24 U.S.Stat., p. 475.)

The Embargo and Non-Intercourse Acts of the early nineteenth century did not produce the anticipated results.

The granting of "days of grace" for loading and departure of merchant vessels at the outbreak of war was common in the World War though owing to different circumstances was not an invariable practice.

The display of force has also been common as emphasizing the position which a state may be urging or as giving weight to a request for prompt action in a matter which one state has brought to the attention of another state. The display of force may even carry an intimation that it may be used to ensure respect for the rights of a state. During the disturbed conditions in Turkey in 1895 the United States felt the need of such support for its minister.

> The efforts of the minister have had the moral support of the presence of naval vessels of the United States on the Syrian and Adanan coasts from time to time as occasion required, and at the present time the San Francisco and Marblehead are about to be joined by the Minneapolis, which has lately been ordered to the eastern waters of the Mediterranean. (1895, Foreign Relations, U.S., p. 1257.)

Convention on Contract Debts, 1907.—The use of force in Venezuela to hasten the payment of claims of foreign nationals in 1902 emphasized the growing objection of some American states to this procedure. This objection had been embodied in the so-called "Drago Doctrine." The matter came before the Second Hague Peace Conference, 1907, and resulted in the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, which provided:

> ARTICLE I. The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any "Compromis" from being agreed on, or, after the arbitration, fails to submit to the award. (1908, Naval War College, International Law Situations, p. 166.)

The distinction between the use of force and war was clearly recognized in the Conference and this agreement was made with the purpose of specifically restricting the use of force.

Requests for a display of force in China were made when the diplomatic representatives feared an outbreak in 1900 and force was used without resort to war after the Boxer movement endangered the safety of foreigners.

The display of force in 1902 by European powers to hasten Venezuelan action upon debts due their nationals was followed by the use of force which the European powers contended was not war but which resolved into war. In the payment of debts by Venezuela as a result of this action, preferential treatment was given to the powers which had used force. (Venezuelan Arbitration, Penfield's Report, 1903, p. 110.) The use of force as well as the war measures in this case was for the single purpose of securing payment of the debts and not for a general war object.

Consequences of pacific blockade.—Some act resembling pacific blockade has been generally regarded as one of the methods for bringing an offending state to terms without resort to war. Pacific blockade has the support of long practice and of a large majority of authorities, particularly since the support given to this form of action in the resolutions of the Institut de Droit International in 1887. In general, the establishing of a pacific blockade is usually approved on the ground that it may make resort to war less probable, and thus limit the range of possible use of force.

In its effects as between the state or states establishing the pacific blockade and the state or states under the blockade, the blockade may close the blockaded areas to

communication so far as it is effectively maintained and measures lawful for maintenance of a war blockade may be taken to this end. As the effects of the pacific blockade should, so far as possible, be confined to the parties concerned, third parties as well as their vessels and goods should be interfered with only as necessary for the physical maintenance of the pacific blockade. This is also evident from the fact that there are no prize courts to pass upon rights. It may be necessary that the blockading forces approach, within the specific area of effective maintenance of the blockade, vessels of third states for the purpose of verification of their right to fly the flag. The blockading force may take such measures as are necessary for closing the port before which it is maintaining an effective blockade. Though it may not take vessels of third states as prize, it may prevent their entrance; and for such detention the blockading state assumes no liability, though notice must be given the vessel of the third state at the line of blockade or in an unquestionable manner. Vessels of third states must also be granted reasonable time to load and depart from a port under pacific blockade.

Blockade of Buenos Ayres, 1838.—The declarations by which some of the blockades of the nineteenth century were established were not uniform. On March 28, 1838, a circular containing the following paragraph referring to the blockade of the port of Buenos Ayres and the Argentine coast was transmitted to the foreign diplomatic and consular representatives by the French Government:

> Je vous prie donc, Monsieur, d'informer votre Government de cette mesure, et de faire connaitre en même tems qu'il sera pris contre les bâtimens qui chercherainet à entrer dans les Ports bloqués, après avoir recu la signification du blocus par l'un des bâtimens de guerre Francais, les mesures de rigueur autorisées par les Lois des Nations. (26 [1837–38] British and Foreign State Papers, p. 973.)

Days of grace for entrance and departure till May 10 were granted.

Le Comte de Thomar, 1848.—The Brazilian vessel *Le Comte de Thomar* had been before a prize commission established at Montevideo at the time of the so-called blockade of the la Plata. The vessel had been released, but war material in its cargo had been condemned by this prize commission, August 6, 1846. The case was subsequently brought before the French Conseil d'Etat, which reviewed the case and declared:

Considérant que, par la décision ci-dessus visée, la commission des prises, en ordonnant la restitution du navire *le Comte de Thomar* et des marchandises trouvées à bord, a néanmoins déclaré valide la prise de 686 barils de poudre et de 50 quintaux de plomb en barre;

Considérant que, si les règles et la pratique constante du droit maritime autorisent la saisie sur un navire neutre des objets de cette nature, qualifiés de contrebade de guerre, c'est dans le cas seulement ou le bâtiment capteur appartient à une puissance belligérante;

Considérant que, qu'il résulte de la lettre du ministre des affaires étrangères que, nonobstant le blocus des côtes de la république argentine, le gouvernement français n'était pas en état de guerre avec ladite république.

ART. 1er. Est déclarée non valide la prise des barils de poudre et des plombs en barre trouvés à bord du navire brésilien *le Comte de Thomar.* (I Pistoyé & Duverdy, p. 390.)

This decision is followed by this brief comment:

Observations.—Nous comprenons qu'un Etat qui bloque un port, sans faire *la grande guerre*, permette le transport des armes et munitions pour le port bloqué. L'arrêt ci-dessus nous paraît un acte de munificence et de libéralité, bien plus qu'un acte juridique. (Ibid.)

Cartagena, 1885.—At the time of domestic disturbance in Colombia in 1885 when other states were at peace, Mr. Bayard, Secretary of State, wrote to Mr. Whitney, Secretary of the Navy, of protection of nationals and their property. He said:

At Cartagena, as at any other point in Colombia, not on the direct line of isthmian transit, the only question presented for our consideration is the general one of the protection of the lives and property of citizens of the United States established

there. Our right in this respect is of course neither more nor less than that of any other government whose citizens or subjects may be found at such points under similar circumstances. Interests of other nationalities than our own are understood to exist at Cartagena. Consequently no measure could be taken by forces of the United States for the protection of their citizens there, which we would not admit the perfect right of another government—that of England, France, or Germany, for instance—to employ for the like protection of its subjects. * * * But where the place of their sojourn is a port open to the world's commerce, to which foreign vessels have a right to resort, the presence of war vessels of their nation is proper to protect the national shipping in port and the lives and property of neutral citizens on shore, from any injurious treatment contrary to the received international rules of warfare. Such war vessels may properly afford asylum to our own noncombatant citizens and normal protection to their interests within the limits of legitimate warfare, and extreme cases may be conceived where the supreme law of self-preservation may require more effective measures if the bounds of legitimate warfare be overpassed. In no event, however, should such measures amount to an intervention in the domestic disturbances of that country by aiding one belligerent against the other. (6 Moore, International Law Digest, p. 29.)

Greece, 1897.—The so-called pacific blockade of Greece in 1897 is one in regard to which the United States took a positive position.

On February 10 the British Government sent to its representatives in Austria-Hungary, France, Germany, Greece, Italy, Russia, and Turkey, the following telegraphic dispatch:

The French Ambassador has suggested to me, and I have agreed, that instructions should be sent to our Naval Commanders in Cretan waters to concert, in case of need, with the Naval Commanders of the other Great Powers for preventing the Greek ships of war from taking any aggressive action, and for taking such measures as seem to be required by the circumstances which may arise. (90 British and Foreign States Papers, 1897–1898, p. 1299.)

On the next day the British Admiralty telegraphed to its naval commander in Greek waters that

It has been suggested by the French Government that the British and French Naval Commanders in Cretan waters should

concert together, and with those of other Powers in case of necessity, to prevent any aggressive action of the Greek ships of war sent to Crete, and, generally speaking, for the adoption of any measures which circumstances may render expedient. The concurrence of Her Majesty's Government has been given. Instruct the Senior Naval Officer at Crete accordingly. (Ibid., p. 1300.)

The German authorities favoring action by the Powers, mentioned that

Not only should aggressive action on the part of the Greek ships be prevented, but any action which might encourage the revolution, and the very fact of their presence in Cretan waters was calculated to encourage it. In His Excellency's opinion, therefore, it would be necessary to give considerable latitude to the Naval Commanders as to the manner in which they should deal with the Greek ships of war, and to authorize them, if they should deem it necessary, to drive them away from Cretan waters. (Ibid., p. 1313.)

On February 16, 1897, the British Government sent to its admiral in Cretan waters instructions to the following effect:

You have authority to take any steps in conjunction with the other Naval Commanders, which may be agreed upon by the Admirals in Council, for the purpose of preventing aggressive action on the part of the Greeks. (Ibid., p. 1316.)

In accord with these instructions certain acts had been approved as was stated in a Foreign Office communication of February 18, 1897:

The Russian Ambassador stated to-day that, at the request of the Ottoman Government, Admiral Andréeff, the Russian Naval Commander in Cretan waters, had been authorized to prevent Greek ships of war from interfering with the transport of Turkish troops between various points of the Cretan coast, and also to occupy by common accord certain other places on the coast, especially Candia, Rethymo, Sitia, Kissamo, and Selino.

The instructions given to the British Admiral will enable him to take part in any measures of this nature which the Naval Commanders of the other Powers may agree. (91 British and Foreign State Papers, 1898–1899, p. 132.)

About this time a joint blockade of Greek ports was proposed, but the Great Powers were faced with the prob-

lem of determining the status of Crete to which they had sent forces and some of the powers were in favor of the continuance of the *status quo*.

The British Embassy in Berlin reported that the German Emperor frowned upon the annexation of Crete by Greece. As "the Great Powers had prevented the Sultan from sending troops to Crete", they were under "moral obligation of preventing the Greeks from annexing the island. * * * If the Great Powers allowed themselves to be defied by Greece, not only would they make themselves ridiculous but they would make themselves responsible for the consequences, which would probably be a general war. For his part, His Majesty could not agree to sanction such lamentable weakness on the part of the Powers, and he would withdraw his flag from the Mediterranean. I ventured to observe that this would bring the European concert to an end, to which His Majesty replied that it did not deserve to exist if it allowed its decisions to be overruled by Greece." (Ibid, p. 137). Many notes were exchanged among the Great Powers and the plan was advanced to make Crete a privileged province with special relations to Greece although it might remain a part of the Turkish Empire.

The British Government informed the cooperating powers on February 24, 1897, of the policy which they considered as according to their view:

1. That the establishment of administrative autonomy in Crete is, in their judgment, a necessary condition to the termination of the international occupation.

2. That, subject to the above provision, Crete ought, in their judgment, to remain a portion of the Turkish Empire.

3. That Turkey and Greece ought to be informed by the Powers of this resolution.

4. That if either Turkey or Greece persistently refuse when required to withdraw their naval and military forces from the island, the Powers should impose their decision by force upon the State so refusing. (Ibid., p. 147.)

Objection was raised to point 4 on the ground that Greece and Turkey should not be subject to identic treat-

ment as Turkish forces were lawfully in Crete while Greek forces were not. On March 20, 1897, the following proclamation signed by the ambassadors of the six powers was issued to the United States.

The Undersigned, under instructions from their respective Governments, have the honor to notify the Government of the United States that the admirals in command of the forces of Austria-Hungary, France, Germany, Great Britain, Italy and Russia in Cretan waters have decided to put the Island of Crete in a state of blockade, commencing the 21st instant at 8 a.m.

The blockade will be general for all ships under the Greek flag. Ships of the six powers or neutral powers may enter into the ports occupied by the powers and land their merchandise, but only if it is not for the Greek troops or the interior of the island. The ships may be visited by the ships of the international fleets.

The limits of the blockade are comprised between 23°24′ and 26°30′ longitude east of Greenwich, and 35°48′ and 34°45′ north latitude. (1897, Foreign Relations U.S., p. 254.)

Joint blockade, 1913.—The officers in command of the British, Austro-Hungarian, French, German, and Italian naval forces notified a blockade as in force from 8 a.m. April 10, 1913, of the Adriatic coast from Antivari to the mouth of the River Dvin. This blockade was extended to Durazzo from 6 a.m., April 23 and was raised from 2 p.m., May 14, 1913.

In reply to a question in the House of Commons, April 7, 1913, Sir Edward Grey had said that certain British vessels were proceeding to the coast of Montenegro to take part in a naval demonstration "with the above named states." He offered the following explanation:

We are party to it because we are a party with the other Great Powers to an agreement which the naval demonstration is intended to uphold. This agreement is that there should be an autonomous Albania. We willingly became a party to this, for the Albanians are separate in race, in language, and to a great extent in religion. The war which is proceeding against them has long ceased to have any bearing on the war between Turkey and the Allies, or to be a war of liberation. The operations of Montenegro against Scutari are part of a war of conquest, and there is no reason why the same sympathy that was felt for Montenegro or other countries contending for liberty and national existence

should not be extended to the Albanian population of Scutari and its district, who are mainly Catholics and Moslem, and who are contending for their lands, their religion, their language, and their lives. (LI Parliamentary Debates, Commons, 1913, p. 816.)

Sir Edward Grey further maintained that the agreement was essential to the peace of Europe and should be upheld by international action.

Blockade of Greece, 1916.—The blockade of Greece by the Allies in 1916, declared to be in effect from December 8, 8 a.m., allowed a period of 48 hours for the departure of "vessels of third powers" from Greek harbors. Protest against this blockade was made by Greek officials as contrary to international law on the ground that peaceful relations existed between Greece and the Allies.

Italian blockade of Fiume, 1920.—The French "Journal officiel de la République Francaise" of December 4, 1920, contained the following notification:

A la date du 1er décembre 1920, le Gouvernement italien a informé le Gouvernement de la République de sa decision de tenir en état de blocus effectif par ses forces navales, à partir du 1'' décembre à 10 heures, la zone côtière de l'Etat indépendant de Fiume, des îles de Veglia et Arbe et des parages avoisinants.

Un delai opportun sera laissé pour la sortie des navires de commerce amis.

This notification does not refer to neutrals but to "amis."

The blockade of Bulgaria, October 16, 1915, referred to "friendly or neutral vessels" as being granted days of grace.

Reprisals.—Early ideas on the doctrine of reprisals, of which boycott may be regarded as a phase, appear among writers. Theologians of medieval times found little difficulty in supporting reprisals by Biblical injunctions. A clear distinction between reprisals in war and reprisals in peace was not always made.

The treatise of Bartolus (1313–59) was quite full upon this.

Victoria (1480–1546) and others of this period write upon the subject. Grotius refers to the reprisals more in relation to war. The words "retorsion", "reprisal",

" embargo ", " nonintercourse " and the like, were not always used in senses that could be clearly distinguished. Retorsion was usually applied to retaliation in kind, while reprisals aimed to secure redress for action by which a state regarded itself to be injured and the means might not be analogous to the injury, but such as the offended state might regard as most effective. Two commercial states might set up by retorsion reciprocal trade barriers, while by reprisal one state might bring another to recognize privileges through holding its king who might chance to be within its borders. In ancient times the limits of reprisals were difficult to determine, though there was a growing sense that they should be proportioned to the injury for which remedy was sought.

Opinions of writers.—Writers upon the topic of pacific blockade have shown wide difference of opinion as to whether it was a lawful measure short of war in spite of the title " pacific." Some have considered it merely a limited hostility but lawful; others have regarded it as unlawful; some have regarded it as lawful only as regards the blockading and blockaded parties; while still others have regarded it as lawful as regards all states and short of war. Practice seems to support the opinion that pacific blockade is a lawful measure of constraint short of war, but operating directly only upon the blockaded and blockading states. In several recent pacific blockades, however, third states have not protested against the application of its provisions determining the number of days of grace allowed to their merchant vessels to withdraw from the blockaded area.

The measures undertaken under the name " pacific blockade " seem to be recognized generally as lawful when confined to the states concerned. These measures seem to be adequately effective only when extended also to third states which would at least create a state of quasi war and quasi neutrality. There arises, therefore, the old question of effectivity of blockade but transferred to

pacific blockade. Under modern conditions of commerce to be really effective a blockade must be against ships under all flags and this degree of constraint is not generally recognized as an attribute of pacific blockade.

Article 16 of the League of Nations Covenant implies measures of collective coercion that go beyond pacific blockade in their inclusive nature but, in the application of force by individual states for effective use of collective force "to protect the covenants of the League", may be more restricted.

Institut de Droit International, 1887.—A report was made to the Institut de Droit International at the meeting in Heidelberg in 1887 upon the right of blockade in time of peace. Dr. Perels, who was the adviser of the German admiralty, made the report. This report admits that the pacific blockade is comparatively modern but that this does not deny its legality, as development of new relations among states implies new methods.

Discussion, 1902.—This Naval War College considered certain aspects of pacific blockade in 1902 showing that while early practice before the middle of the nineteenth century had extended the operation of the blockade to third powers, later practice had tended to limit the effects of pacific blockade to the parties directly concerned. In the résumé of the discussion in 1902, it was said:

> It would seem from the weight of authorities and from the majority of later cases, that pacific blockades should not bear upon third states except as they are affected by the constraint directly applied to the state blockaded, i.e., the vessels of a third state should be entirely free to go and come while such measures of constraint as may be decided upon may be applied to the blockaded state.
>
> If the need for interruption of relations between the blockaded state and third states is sufficiently serious to require the seizure of neutral vessels, it would seem to warrant the institution of a regular blockade involving a state of war.
>
> If only the mild constraint which is short of war, the blockade affecting merely the blockaded state's commerce, is necessary,

then pacific blockade, though it works inconvenience, may be legitimate. (1902, Naval War College, International Law Situations, p. 87.)

It was further said in the conclusions that it was now (1902) the general opinion:

(1) That pacific blockade should be exclusively confined to those who are parties to it and should not be extended to third states.

(2) That pacific blockade as a measure short of war does not involve any neutrality on the part of those not parties to it.

(3) That pacific blockade should be limited as far as possible that it may not be confused with belligerent blockade, which is definitely outlined. (Ibid., p. 97.)

American Institute of International Law, 1925.—In 1925 the American Institute of International Law presented a plan for measures of repression enumerating "measures of self-redress short of war." In the list are included nonintercourse and pacific blockade. While pacific blockade is regarded in this project as a use of force, it is not regarded as giving rise to a state of war though when applied to vessels of third states it is considered "in effect an act of war."

ARTICLE 10.

PACIFIC BLOCKADE.

Pacific blockade consists in the obstructing or closing of the ports or coasts of one country by another. Its purpose is to prevent access to or egress from a foreign port or coast—compelling the territorial sovereign to yield to the demands which have been made upon the blockaded state. If confined solely to the country against which the measure is taken, the act is said to be pacific, and it does not necessarily create a state of war. If the blockade affects the vessels of other nations, it is in effect an act of war. (20 American Journal, International Law, Sup., 1925, project no. 29, p. 383.)

Pacific blockade and Article 16.—In a report of May 17, 1927, of the Secretary General of the League of Nations upon the legal position which would arise in enforcing article 16 of the Covenant of the League of Nations in time of peace, it was said:

The question how far the sanctions can lawfully be carried without resort to war is considered below with reference to each of the above classes of State. It may be noted here that, from the legal point of view, the existence of a state of war between two States depends upon their intention and not upon the nature of their acts. Accordingly, measures of coercion, however drastic, which are not intended to create and are not regarded by the State to which they are applied as creating a state of war, do not legally establish a relation of war between the states concerned. This would seem to be the case even if, as is suggested to be possible under point (c) below, third States find it necessary to guide their own conduct by the view that a state of war exists. There is no general rule of international law under which application of the economic sanctions would automatically produce a state of war. (Reports and Resolutions, League of Nations Documents, A. 14. 1927. V., p. 83.)

Later it is said:

It is therefore prudent to conclude that, in applying the economic sanctions of Article 16 without resort to war, the Members of the League must fully respect the rights of third States. (Ibid., p. 86.)

The hope was expressed, however, that third states would adopt a "benevolent attitude" toward the League policy.

It was also said in this report that:

It would not in fact be prudent to attempt to lay down positively in advance the measures which the Members of the League could consider themselves as legally entitled to adopt toward third States under the form of a pacific blockade. Not merely is the existing law uncertain but it is uncertain how far third States would or would not be disposed to take a narrow view of the application of the existing law to the special and unprecedented case of a pacific blockade applied under Article 16 of the Covenant. The tendency before the war of 1914–18 was to recognize that a pacific blockade imposed in the interests of international order by a number of Powers had a much higher claim to be regarded as an institution of international law than a blockade enforcing the particular interests of certain Powers, and a blockade under Article 16 is in the fullest sense one falling within the first category.

It appears to be a legitimate conclusion from the practice and doctrine of international law before the war of 1914–18 that a pacific blockade imposed in application of Article 16 of the Cove-

nant and observing certain conditions and limits would be a measure the legal validity of which should be recognized by third States. To secure such recognition from third States, it would seem that the blockade ought to comply with the conditions as to notification and effectiveness which apply to a blockade in time of war. The blockade would give the right not to confiscate but to sequestrate ships of the blockaded State attempting to break through it and their cargoes, the ships and cargoes being ultimately returned without compensation to their owners. It would seem, further, that third States would not legally be entitled to object to the enforcement of the blockade, with the suggested consequences, against ships of Members of the League, whether applying the sanctions or not, and their cargoes.

On the other hand, it is very doubtful whether the third State would be legally bound to acquiesce in the enforcement of the blockade against its own ships and their cargoes. (Ibid., p. 88.)

Object of measures short of war and boycott.—The object of measures short of war is usually to settle some difference in which the parties are directly concerned. This is the case in retorsion, reprisals, and retaliation in various forms. Nonintercourse and embargo decrees usually contain some statement of injuries for which remedy is sought by the state establishing the regulation. Pacific blockade as a measure short of war has at times been used as a means of remedy for a condition in which the parties proclaiming the blockade are only indirectly concerned.

International boycott has been advocated as a means of putting pressure upon a state which may be considered to have failed to fulfill some international obligation which may only remotely concern the states engaging in the boycott. The boycott is especially aimed to put an end to commercial relations with the boycotted state. When such boycott is solely an act of individuals who without any participation or action of the state refrain from commercial relations with the nationals of another state, the boycott as such has no bearing upon international law. A modern state would scarcely expect, without laying itself open to reprisals, to determine with

whom or in what its nationals should trade other than by general tariff laws and treaties.

If members of the League of Nations under article 16 prevent "all financial, commercial, or personal intercourse between the nationals of the covenant-breaking state and the nationals of any other state, whether a member of the League or not", then such an act by whatever name it is called, ceases to be a private and becomes a public act with international consequences. If the so-called "covenant-breaking state" is a land-locked state, the action of the other states would partake of the nature of a boycott which the participating states would be under obligations to enforce by appropriate measures. If the covenant-breaking state has a seacoast, the enforcement of the prevention called for would partake of the nature of what in earlier days has been called a pacific blockade, a measure which has often been used by states to bring another state to fulfill its obligations or to take certain action.

While boycott was in its early development an individual and unofficial action, as in China in the early part of the nineteenth century, it gradually took on a political nature and when it became collective and more or less official, protests were made. The dangers of unauthorized, individual, or collective action by groups of individuals in retaliation against action of a foreign state was recognized. Such action might be based upon incorrect or partial understanding of the circumstances and might involve the state whose nationals engaged in the boycott in serious consequences, making the settlement of a question more difficult. At the same time, boycott was recognized as a measure which might be very potent if properly used but unless the state acted directly or indirectly, the state could not be held responsible for determining whether its nationals discriminated against the goods or commerce of a specific state. An unofficial boycott by nationals has extended in some instances not

merely to goods and commerce but also to persons, language, journals, music, etc., of the state against which pressure was aimed. Article 16 of the Covenant of the League of Nations endorsed the prevention of all intercourse between the nationals of a covenant-breaking state and the nationals of other states, and provided for mutual support, even presuming the use of force, and affording passage through their territory to forces cooperating to protect the covenants of the League. For maritime states somewhat similar measures had been undertaken for a century in what had come to be known as pacific blockade which aimed at a partial isolation of a state while article 16 aimed at complete isolation.

Some have maintained that article 16 contemplates a resort to war on the part of the covenant-breaking state against which the other members of the League undertake only such measures as will isolate the offender. Others have maintained that an act of war having taken place, a state of war exists, and the consequences are limited only by the laws of war and neutrality. Paragraph 2, of article 16, seems to give the council authority to recommend such use of armed forces as may be needed to protect the covenants of the League without necessarily creating a state of war in the technical sense but authorizing the use of force to protect the covenant. The provisions of article 16 would not be necessarily applicable to a state of war but to a condition of isolation consequent upon a disregard of its covenants. Of course this article 16 was drawn with the expectation that all the more powerful states would be members of the League under which conditions its application would be more simple.

Chinese boycott, 1905.—The termination of the treaty of 1894 between the United States and China after its 10-year period in 1904, made it desirable to negotiate a new treaty. Rumors spread in China that its terms were to be detrimental to China and it was urged that the

people should show their opposition by boycotting after August 1, 1904, "all American schools, business, goods, products, and ships unless the exclusion treaty guaranteed equitable treatment to travelers, students, and merchants entering the United States." Minister Rockhill, long familiar with oriental diplomacy, found much to confirm his opinion that the boycott was "with official approval if not actually at official suggestion." The governmental encouragement seems evident from notices and proclamations.

The Chinese Government was notified in early August, 1905, that under early treaties the United States would hold China "responsible for any loss sustained by the American trade on account of any failure on the part of China to stop the present organized movement against the United States." (1905 Foreign Relations, U.S., p. 212.) Later the Chinese Government informed Minister Rockhill that the Government assumed no responsibility as the movement was started by the traders.

Boycott of Danzig.—Owing to differences of various kinds with the Polish Government accusations were made that Danzig had suffered by measures taken in Poland against the Free City. A report by the Government of the Free City of Danzig, August 14, 1931, says:

> A particularly serious difficulty in the relations between Danzig and Poland is due to the economic injury suffered by the Free City as the result of measures taken by the Polish Government. Unfortunately no alleviation or improvement has been perceptible in this respect since the session of the Council in May. An impression has, on the contrary, been created in the Danzig population that the Polish Government, by its economic measures against Danzig, has been deliberately aiming at injuring the trade and industry of Danzig and at the same time at weakening, in this way, the resistance of the Danzig population to Polish political aims. It is incomprehensible, otherwise, that the Polish Government, which, in view of the Customs and economic union, has it in its power to grant Danzig all kinds of economic facilities, should bluntly reject all suggestions of the Danzig Government to this effect, and should on the contrary keep contriving

new measures which are bound seriously to injure Danzig's trade and industry. The repeated attempts of Danzig—more particularly through the commercial senator—to bring about an exchange of views on all questions still pending have proved abortive. Poland has made no use of this opportunity, but has, without any real grounds, postponed negotiations indefinitely, especially on the subject of the exceptional importation of specific goods, of so-called quotas, which are indispensable for the economic life of Danzig. The Danzig Chamber of Commerce has exerted itself in the same direction as the Danzig Government. As evidence may be mentioned the fact that it not long ago issued a warning in a public proclamation not to reply to the extensive boycotting of Danzig goods in Polish circles by a counter boycott of Polish goods in Danzig. Economic co-operation, as provided for in the treaties, is a preliminary condition for regular political relations between Danzig and Poland. The unjust exclusion of Danzig trade from the Polish hinterland, the confiscation of Danzig goods in Poland—contrary to the spirit of the treaties—the steady increase in the boycotting movement, are bound to create in the particular circles affected in Danzig a state of discontent which may have most serious consequences. If normal relations are to be established between the two States, dependent upon one another as the result of the treaties, it is essential first and foremost to eliminate the economic pressure still brought to bear by Poland on Danzig. (Access to, or anchorage in, the port of Danzig of Polish war vessels. Permanent Court of International Justice, Series C, No. 55, p. 36.)

Committee on Boycotts and Peace, 1932.—In 1931 the Trustees of the Twentieth Century Fund entrusted to a committee the drawing up of a report on Economic Sanctions for the Pact of Paris. In the report of this committee, March 2, 1932, the following was mentioned as the crucial question to which the committee was giving attention.

What shall be the attitude and the policy of the other powers signatory to the Pact of Paris, if one or more of their number, failing to conform to the pledge given in the Pact, do begin or threaten hostilities?

The Committee on Economic Sanctions is of opinion that the time has now fully come for the powers signatory to the Pact of Paris to declare, in answer to this question, what, under such circumstances, will be their policy.

In the present state of world opinion, it is highly probable that no people whose government is signatory to the Pact of Paris will desire the use of their government's military and naval forces in the settlement of international quarrels arising elsewhere in the world. Nevertheless, a clear and definite violation of the pledges given in the Pact of Paris may easily lead to another world-wide armed conflict, this time finally and fatally disastrous in its effects.

The Committee accordingly suggest that the signatories of the Pact of Paris should enter into an appropriate protocol or agreement supplemental to that Pact whereby they will engage themselves, in the event of hostilities, actual or threatened, promptly to consult together with a view to determine upon measures of nonintercourse which would be appropriate to prevent the threatened breach of the Pact, or if it could not be prevented, to end hostilities and to restore the status existing prior to the breach.

Among the measures of nonintercourse which could be applied would be:

(1) A cessation of any shipment of arms or munitions or other absolute contraband;

(2) Such further economic sanctions and concerted measures, short of the use of force, as may be determined to be appropriate and practical under the circumstances of any given case. (Boycotts and Peace, E. Clark, editor, p. 7.)

The nonintercourse measures proposed are those short of the use of force. There are many grounds for believing that the states of the world do not yet regard such measures as sufficing for their security.

Measures of constraint.—Even before the World War there was a growing interest in the settlement of differences between states without resort to war. In early times there was resort to measures of restraint upon commercial intercourse between states in order to bring one state to accept the terms proposed by another or in order to check certain actions.

It was maintained that a state might control its own territories and determine at will what passed its frontiers. It was sometime stated that tariff acts were an evidence of the right of a state to control commerce. The reply to this was that tariff acts were of general application while these other measures were aimed at a single state.

Whenever nationals of one state of their own volition assume an attitude which limits or puts an end to their relations with the nationals of another state, this attitude was regarded before 1914 as beyond state control and as an act for which a state could disclaim all responsibility even though injury to the commerce or other injury might be suffered. If a state encouraged or officially participated in this attitude, then there might be ground for international complaint on the part of a friendly state.

Peace conferences as at Berne, 1892; Budapest, 1896; Paris, 1900; Milan, 1906; and Geneva, 1912, had proposed measures for making effective the awards of international tribunals. Among the measures suggested which received particular support was the prohibition of economic relations with a recalcitrant state. Some peace conferences arrived at the conclusion that mere agitation for the spread of good will would not attain the hoped-for peace among states, and that states should be made to realize that peace was essential to national progress and preferable to war. To this end these conferences proposed measures which would result in economic isolation of states not fulfilling their international obligations.

The Tampico incident, 1914.—In 1914 while there was a disturbed condition of affairs in Mexico, an event at Tampico gave rise to various complications. The event is thus set forth by the American Admiral Mayo in a communication to the Mexican commanding officer of the Huertista forces resisting the constitutionalists ashore:

> This morning an officer and squad of men of the Mexican military forces arrested and marched through the street of Tampico a commissioned officer of the United States Navy, the paymaster of the U.S.S. *Dolphin*, together with seven men composing the crew of the whaleboat of the *Dolphin*.
>
> At the time of this arrest the officer and men concerned were unarmed and engaged in loading cases of gasoline which had been purchased on shore. Part of these men were on the shore, but

all, including the man or men in the boat, were forced to accompany the armed Mexican force.

I do not need to tell you that taking men from a boat flying the American flag is a hostile act not to be excused.

I have already received your verbal message of regret that this event had happened, and your statement that it was committed by an ignorant officer.

The responsibility for hostile acts cannot be avoided by the plea of ignorance.

In view of the publicity of this occurrence, I must require that you send me, by suitable members of your staff, formal disavowal of and apology for the act, together with your assurance that the officer responsible for it will receive severe punishment. Also that you publicly hoist the American flag in a prominent position on shore and salute it with twenty-one guns, which salute will be duly returned by this ship.

Your answer to this communication, should reach me and the called-for salute be fired within twenty-four hours from 6 p.m. of this date.

MAYO.

(1914, Foreign Relations, U.S., p. 448.)

An apology was offered but the salute to the flag was not rendered and at length President Wilson on April 20, addressed Congress. Setting forth the grave situation in Mexico, he said:

I, therefore, come to ask your approval that I should use the armed forces of the United States in such ways and to such an extent as may be necessary to obtain from General Huerta and his adherents the fullest recognition of the rights and dignity of the United States, even amidst the distressing conditions now unhappily obtaining in Mexico.

There can in what we do be no thought of aggression or of selfish aggrandizement. We seek to maintain the dignity and authority of the United States only because we wish always to keep our great influence unimpaired for the uses of liberty, both in the United States and wherever else it may be employed for the benefit of mankind. (Ibid., p. 476.)

The address resulted in the following action:

In view of the facts presented by the President of the United States in his address delivered to the Congress in joint session on the twentieth day of April, nineteen hundred and fourteen, with regard to certain affronts and indignities committed against the United States in Mexico: Be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is justified in the employment of the armed forces of the United States to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States.

Be it further resolved, That the United States disclaims any hostility to the Mexican people or any purpose to make war upon Mexico.

Approved, April 22, 1914. (38 U.S. Statutes, p. 770.)

In communicating this action to American diplomatic representatives abroad on April 23, 1914, Secretary Bryan said:

Please note that the word "justified" is used instead of "authorized." This was done to emphasize the fact that the resolution is not a declaration of war but contemplates only the specific redress of a specific indignity.

Admiral Fletcher has taken possession of custom-house at Vera Cruz. No resistance at time, but later battery and scattered forces fired on Americans, which was returned. Four Americans killed, twenty wounded. Loss on Mexican side not known; estimated 150. (1914, Foreign Relations, U.S., p. 483.)

Argentine, Brazil, and Chile offered good offices, which were accepted, and the mediators were to assemble at Niagara Falls, May 18. So far as possible it was hoped that the *status quo* would not be changed. After much negotiation, on November 20, 1914, the Acting Secretary of War telegraphed to General Funston, of the occupying forces at Vera Cruz:

You will evacuate Vera Cruz on Monday, November 23d. You will bring with you to the United States all funds in your possession from whatever source derived, both United States funds and Mexican customs receipts and taxes. You will also bring with you all the records, accounts, and money papers necessary to establish the integrity and accuracy of your financial and other administration. You will make an inventory of all goods in the customs house keeping the original thereof and leaving a copy with Consul Canada. You may also leave with Consul Canada such copies of accounts or other data as may be required by whomsoever may continue the government of the city. Do not make any arrangements with local Mexicans or with Mexican

representatives from outside the city that could make it seem that you are recognizing the right of Carranza to jurisdiction over the city. It is merely desired that you get out in the best practical fashion, leaving things in as good shape as possible and making no declaration that could be interpreted as committing this Government to the recognition of the authority of any individual or faction. (Ibid., p. 625.)

Dominican Republic, 1916.—On January 19, 1916, the American Minister to the Dominican Republic telegraphed to the Secretary of State saying: "I think the Department should be prepared for probable difficulty in the country soon." On account of this and other information, the Secretary of State informed the Minister that if requested the American Government would "furnish the forces necessary to suppress insurrection and maintain order." (1916, Foreign Relations, U.S., p. 220.) The difficulty implied in the Minister's telegram, though a little delayed, arose, and war vessels were dispatched to Santo Domingo and other ports. In May 1916 forces under Admiral W. B. Caperton took control of the city of Santo Domingo and elsewhere in order to take such action "as is necessary to protect United States forces ashore, preserve peace, lives, protection and property of American citizens and other foreigners and to constituted authority." (Ibid., p. 230.)

Capt. H. S. Knapp, U.S.N., commander of the cruiser force, United States Atlantic Fleet, under authority of his Government, on November 29, 1916, declared the Dominican Republic to be in the state of military occupation by forces of the United States. This proclamation declared the occupation to be undertaken to restore internal order and to enable the Republic to fulfill its international obligations.

The United States Government also took over military control in certain parts of Haiti in 1915 and 1916 in order "to safeguard as far as possible the interests of all concerned", as insurrectionary movements had prevailed for some months.

Russia, 1917.—A somewhat exceptional situation arose in consequence of the revolution in Russia in 1917. This led some of the Allied Powers to put what amounted to an embargo upon shipments to Russia, though in some cases the embargo extended to munitions only. The United States took the position that it was "important that the impression should not be created in the minds of the Russian people that they have been abandoned by the Allies or the United States Government, and for that reason this Government has told the Russian representatives that all shipments of supplies being manufactured in this country other than munitions will be permitted to go forward. The question came up as to whether railway supplies were munitions and Department told Russian Ambassador that licenses would be granted for shipment of engines and rails." (1918, For. Rel. U.S., 3 Russia, p. 107.)

Dispute between Italy and Greece, 1923.—In discussing whether articles 12 and 15 of the Covenant could be applied to the occupation of Corfu, M. Salandra, the Italian representative, read a note from his Government on this question:

> What is the Greek contention? It is that the occupation of Corfu was a hostile act which may lead to a rupture dangerous for the peace of the world. Italy, however, has solemnly declared that this occupation had no hostile character—that it was merely designed to assure obligations arising out of responsibility for a terrible crime. There is no danger of war. There is not even a suspension of diplomatic relations. * * *
>
> The creation of the League of Nations does not constitute a renunciation of States of all right to act for the defence and safety of their rights and their dignity. If this were so, no State would desire to belong to the League. (League of Nations, Official Journal, July–December, 1923, p. 1288.)

After the settlement of the dispute, M. Salandra asked permission to present certain observations. In speaking of "peaceful occupation", he said:

> It must not be thought that the Covenant of the League of Nations forbids these peaceful means of repression. They are

not forbidden by any of its articles. I may add that in its Preamble the principles of international law are expressly recognised. Among these principles is the right of peaceful reprisals and of occupation as a measure of guarantee. These reprisals are therefore legitimate. (Ibid., p. 1314.)

In a later discussion on the interpretation of certain articles of the Covenant, Lord Robert Cecil commented on M. Salandra's point of view, and said:

In the last speech that he made on the Italo-Greek question, he (M. Salandra) undoubtedly took up the question of the legitimacy of reprisals in general, not only with respect to the occupation of territory but as to a great number of other reprisals; he argued with great force—and I am not at all prepared to say that I disagree with him—that, until the adoption of the Covenant at any rate, there was a right of reprisal or coercion—call it what you will—which one country might undertake in order to enforce demands on another.

In my young days, when I was more familiar with the text-books of international law than I am now, I think such actions used to be called measures short of war.

Mr. Salandra also argued that the Covenant had made no difference to those rights. That is an interesting argument, and, though it would be hypocrisy to say that the question had not become acute owing to recent events, yet it is a question of very great interest and importance for the public law of Europe at this moment. A great number of instances have actually occurred, and others have been threatened, of measures of coercion being applied by one State against another. I think it is of great importance for the Council of the League to be informed exactly how far these are legal nowadays under the Covenant, because evidently the Council may have to deal with such situations at any moment. (Ibid., p. 1321.)

Lord Robert Cecil suggested that this be put in the form of a proposal and submitted to the Permanent Court of International Justice. He proposed:

The existence and nature of the right of one State to enforce demands made upon another State by measures of coercion and reprisal, and how far, if at all, the Covenant has modified any such rights as between Members of the League.

It was finally decided to put certain questions before a Committee of Jurists.

Questions before League of Nations, 1923.—Certain questions in regard to the use of force arose in 1923 early in the existence of the League of Nations. These questions were referred to a Committee of Jurists consisting of M. Adatci (Japan), Lord Buckmaster (Great Britain), Dr. Enrique Buero (Uruguay), M. F. de Castello Branco Clark (Brazil), M. Fromageot (France), Dr. van Hamel (director of the legal section of the Secretariat), M. Vittorio Rolandi Ricci (Italy), M. Oesten Unden (Sweden), Marquis de Villa Urrutia (Spain), and M. de Visscher (Belgium). One of these questions was:

QUESTION 4.

Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Article 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in those articles? (League of Nations, A. 8. 1924, p. 9. Report to Fifth Assembly.)

To this question the reply was not conclusive but was supported in the vote approving the replies as a whole. The following was the reply to the fourth question:

Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures. (Ibid., p. 10.)

Treaty of Versailles, 1919.—Some late treaties have contemplated the possibilities of reprisals and other measures. Even the Treaty of Versailles, which contains the Covenant of the League of Nations, contains some such clauses. In the part of that treaty relating to reparations, it is said:

17. In case of default by Germany in the performance of any obligation under this Part of the present Treaty, the Commission will forthwith give notice of such default to each of the inter-

ested Powers and may make such recommendations as to the action to be taken in consequence of such default as it may think necessary.

18. The measures which the Allied and Associated Powers shall have the right to take, in case of voluntary default by Germany, and which Germany agrees not to regard as acts of war, may include economic and financial prohibitions and reprisals and in general such other measures as the respective Governments may determine to be necessary in the circumstances. (Part VIII, annex II, 17, 18.)

Force has been used in the occupation of certain areas of Germany.

League of Nations Covenant, 1920.—The Covenant of the League of Nations became operative by the ratification of the Treaty of Versailles, January 10, 1920. The preamble of the Covenant states that:

THE HIGH CONTRACTING PARTIES.

In order to promote international co-operation and to achieve international peace and security

by the acceptance of obligations not to resort to war,

by the prescription of open, just and honorable relations between nations,

by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and

by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, Agree to this Covenant of the League of Nations. (1919, Naval War College, Int. Law Documents, p. 8.)

League of Nations and war.—The Covenant of the League of Nations in article 16 states:

1. Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League of not.

2. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

3. The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimize the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

4. Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

By this article 16 a state of war is contemplated in which the forces of members of the League are to be used, and by article 17 a nonmember may take advantage of League procedure, or in case the nonmember refuses article 16 may become operative, or, if both parties refuse, the Council of the League "may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute." In article 11 it had been declared that "any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations."

League of Nations and measures short of war.—Article 10 and articles 12, 13, and 15 contemplate measures short of war but which may lead to war if League procedure is disregarded. Article 10 contains a positive obligation:

The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case

of any such aggression or in case of any threat of danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

Articles 12, 13, and 15 provide for procedure in case of "any dispute likely to lead to rupture" prior to "resort to war." The preservation of members of the League against aggression as contemplated in article 10 might involve such measures short of war as the Council may advise.

Relations of third states.—Specific measures involving the use of force without declaring war have been varied and have often been resorted to in order to avoid war. The use of force by one state against another may inconvenience third states without involving any of the relations arising from the status of neutrality.

Undoubtedly the Covenant of the League of Nations binds the members of the League to take such action as the League may deem wise "to safeguard the peace of nations." It may be difficult in a certain case to determine the extent and exact nature of this obligation. It may be and has been contended that self-protection justifies such acts as may be essential to the preservation of a state's existence and until the League is in position to exercise "the enforcement by common action of international obligations", a state must take necessary measures for its immediate security without waiting the slow processes of the League. States in becoming members of the League of Nations did not agree to give up their legitimate rights of self-defense but conceived that they would be more secure. The Covenant of the League of Nations recognizes the possibility of resort to war after a delay of 3 months when an award has been rendered by the arbitrators or a report by the Council. There remain many questions in regard to the relations of third states when the acts of two states seem to be leading to measures which are not strictly pacific.

United States Navy Regulations.—The right of self-preservation is generally recognized both in time of peace

and in time of war. In time of war acts which would not be regarded as lawful in time of peace are tolerated. Interference with neutral trade in certain articles as in case of contraband, with movement of ships to specified ports as in case of blockade, and other restrictions upon neutral action are generally admitted to be lawful. These are derived from the right of the belligerent to protect itself and to weaken its opponent.

Even in time of peace it may be essential to use force. The Navy Regulations of the United States state:

1646. On occasions where injury to the United States or to citizens thereof is committed or threatened, in violation of the principles of international law or treaty rights, the commander in chief shall consult with the diplomatic representative or consul of the United States, and take such steps as the gravity of the case demands, reporting immediately to the Secretary of the Navy all the facts. The responsibility for any action taken by a naval force, however, rests wholly upon the commanding officer thereof.

1647. The use of force against a foreign and friendly state, or against anyone within the territories thereof, is illegal. The right of self-preservation, however, is a right which belongs to States as well as to individuals, and in the case of States it includes the protection of the State, its honor, and its possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the State or its citizens may suffer irreparable injury. The conditions calling for the application of the right of self-preservation can not be defined beforehand, but must be left to the sound judgment of responsible officers, who are to perform their duties in this respect with all possible care and forbearance. In no case shall force be exercised in time of peace otherwise than as an application of the right of self-preservation as above defined. It must be used only as a last resort, and then only to the extent which is absolutely necessary to accomplish the end required. It can never be exercised with a view to inflicting punishment for acts already committed.

1648. Whenever, in the application of the above-mentioned principles, it shall become necessary to land an armed force in foreign territory on occasions of political disturbance where the local authorities are unable to give adequate protection to life and property, the assent of such authorities, or of some one of them, shall first be obtained, if it can be done without prejudice to the interest involved.

Locarno treaties, 1925.—The treaties relating to peace in Europe of October 16, 1925, commonly called the treaties of Locarno, aimed to give "supplementary guarantees within the framework of the Covenant of the League of Nations, and the treaties in force between them."

In the treaty of mutual guaranty between Germany, Belgium, France, Great Britain, and Italy, these states by article 1:

> collectively and severally guarantee, in the manner provided in the following Articles, the maintenance of the territorial *status quo* resulting from the frontiers between Germany and Belgium and between Germany and France, and the inviolability of the said frontiers as fixed by or in pursuance of the Treaty of Peace signed at Versailles on June 28, 1919, and also the observance of the stipulations of Articles 42 and 43 of the said Treaty concerning the demilitarised zone. (54 League of Nations, Treaty Series, p. 289.)

In article 2:

> Germany and Belgium, and also Germany and France, mutually undertake that they will in no case attack or invade each other or resort to war against each other.
>
> This stipulation shall not, however, apply in case of:
>
> (1) The exercise of the right of legitimate defence, that is to say, resistance to a violation of the undertaking contained in the previous paragraph or to a flagrant breach of Articles 42 and 43 of the said Treaty of Versailles, if such breach constitutes an unprovoked act of aggression and by reason of the assembly of armed forces in the demilitarised zone, immediate action is necessary;
>
> (2) Action in pursuance of article 16 of the Covenant of the League of Nations;
>
> (3) Action as the result of a decision taken by the Assembly or by the Council of the League of Nations or in pursuance of article 15, paragraph 7, of the Covenant of the League of Nations, provided that in this last event the action is directed against a State which was the first to attack. (Ibid., p. 293.)

Pact of Paris, 1928.—The Pact of Paris, August 27, 1928 (Kellogg-Briand Pact), has been generally ratified

by the states of the world, and its essential articles are as follows:

ART. 1. The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

ART. 2. The high contracting parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Article I enunciates a condemnation and renunciation of international war.

Article II, which is in form of an agreement, provides that settlement or solution of disputes among the parties "shall never be sought except by pacific means."

No procedure for putting this article into operation was provided. No provision was made for its termination or revision. Some states have therefore regarded the pact as another step toward assuring the continuation of the *status quo* except as it may be modified by friendly negotiation.

There remains, however, a great difference of opinion as to what are "pacific means." There are those who argue that the pact is much weaker than article 10 and the following articles of the Covenant of the League of Nations.

The Senate of the United States in ratifying the Pact of Paris recorded in the report of the Senate Committee on Foreign Relations its understanding of the effect of the treaty.

The committee reports the above treaty with the understanding that the right of self-defense is in no way curtailed or impaired by the terms or conditions of the treaty. Each nation is free at all times and regardless of the treaty provisions to defend itself, and is the sole judge of what constitutes the right of self-defense and the necessity and extent of the same.

The United States regards the Monroe doctrine as a part of its national security and defense. (70 Con. Rec., Jan. 15, 1929, p. 1730.)

Collective action.—The proposals for collective action for the maintenance of peace or for the carrying out of an agreed policy has been common among states. The doctrine of balance of power and the concert of powers in Europe modified the course of action of European powers and the distribution of the spoils of war. Alliances usually ostensibly for the maintenance of peace often sought the establishment of the *status quo*. Alliances and ententes frequently equalized opposing groups to a degree which made the risk of disturbing the peace greater than any party cared to assume.

Some of the resultant combinations have put forth doctrines of broad scope, while others have proposed regional policies. The division on the basis of "Great Powers" and "Minor Powers" has been fundamental in some of the acts of European states. The contentions which led to a more general recognition of the idea of equality of states made some new basis of collective action essential. This was realized at the close of the World War in 1918 and the Covenant of the League of Nations in part embodied the then existing aspirations for collective action by the states of the world.

Early United States action.—The Articles of Confederation of the United States, 1778, provided for common action as in article III:

> The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

Article XIII provided further for observance of the articles.

> Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be

agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.

Realizing that the lack of specified means for carrying out the provisions of article XIII might give rise to difficulties, the matter was considered and a form of action somewhat similar to that proposed in the League of Nations' Covenant was set forth for application in case of a state that had failed to observe article XIII:

the said United States in Congress assembled are fully authorized to employ the force of the United States as well by sea as by land to compel such State or States to fulfill their federal engagements, and particularly to make distraint on any of the effects vessels and merchandizes of such State or States or of any of the Citizens thereof wherever found and to prohibit and prevent their trade and intercourse as well with any other of the United States and the Citizens thereof, as with any foreign State, and as well by land as by sea until full compensation or compliance be obtained with respect to all requisitions made by the United States in Congress assembled in pursuance of the Articles of Confederation. (20 Jour. Cont. Cong., Hunt ed., p. 470.)

Constitutional provisions of the United States.—Article 1 of the Constitution of the United States, section 8, states that Congress shall have power to provide for the common defense and general welfare of the United States and "to regulate commerce with foreign nations."

Under the constitutional powers an act of Congress, June 13, 1798 (1 U. S. Stat. 565), suspended commercial intercourse between the United States and France.

British-Swedish concert, 1813-14.—By the treaty of March 3, 1813, Great Britain agreed to cooperate with Sweden "for the maintenance of the independence of the North" and in article II, it was stated:

that His Britannic Majesty will not only not oppose any obstacle to the annexation and union in perpetuity of the Kingdom of Norway as an integral part to the Kingdom of Sweden, but also will assist the views of His Majesty the King of Sweden to that effect, either by his good offices, or by employing, if it should be necessary, his naval co-operation in concert with the Swedish or Russian forces. (1 British and Foreign State Papers, p. 298.)

The Swedish-Russian treaties of April 5 and June 15, also promised Russia both diplomatic and military aid. Prussia also agrees to aid Sweden by a separate and secret article, April 22, 1813.

The British blockade of the ports of Norway was notified on April 29, 1814. The Foreign Office announcement was as follows:

> Earl Bathurst, one of His Majesty's Principal Secretaries of State, has this day notified, by command of His Royal Highness the Prince Regent, to the Ministers of Friendly Powers resident at this court, in the name and on the behalf of His Majesty, that the necessary measures have been taken by command of His Royal Highness, for the Blockade of the Ports of Norway, and that from this time all the measures authorized by the Law of Nations will be adopted and executed with respect to all Vessels which may attempt to violate the said Blockade. (Ibid., p. 1277.)

This blockade was raised under the following notice issued September 3, 1814:

> Earl Bathurst, one of His Majesty's Principal Secretaries of State, has this day notified, by command of His Royal Highness the Prince Regent, to the Ministers of Friendly Powers resident at this Court that the necessary orders will forthwith be issued to the Officer commanding His Majesty's Ships and Vessels employed in the Blockade of the Coast of Norway, to discontinue the said Blockade. (Ibid., p. 1277.)

United action.—While the United States has generally refrained from agreeing in advance to act together with the military forces of other powers, yet it has at times expressed willingness to cooperate. Prince Bismarck in 1870 raised question as to " whether it would not be for the common interest of the powers engaged in the China trade to inaugurate a plan of combined action, to be settled by previous arrangement between the various governments, or between the commanders of the several squadrons." (1870, Foreign Relations, U.S., p. 330.) The British Government gave orders for cooperation of its naval forces in combined measures and later Secretary Fish replied to the Minister of the North German Union as follows:

DEPARTMENT OF STATE,
Washington, March 31, 1870.

SIR: Referring to your notes of the 19th and 25th of February last, and of the 28th of March current, concerning a proposed combined action of the naval forces of the United States and of North Germany for the suppression of piracy in the Chinese waters, I have now the honor to inform you that the President has taken great pleasure in complying with the request of Count Bismarck, by directing instructions to be issued from the Navy Department to Admiral Rogers, to cooperate for that purpose with the naval forces of the North Germany and such other powers as shall receive similar instructions.

The cooperation of Admiral Rogers and of the forces under his command will, however, be limited to cases of recognized piracy. He will be instructed to proceed in such a way as not to wound the sensibilities of the Chinese government, or to interfere with the lawful commerce of the Chinese subjects, or to conflict with the peaceful policy toward China in which the government of North Germany and the United States so happily agree.

I avail myself of this opportunity to renew the assurances of my distinguished consideration.

HAMILTON FISH.

(Ibid., p. 331.)

Cooperation on slave trade.—The United States has from time to time agreed to cooperate with other states in the use of force. The suppression of the slave trade was a ground for such action as provided in the treaty of 1842 with Great Britain:

ARTICLE VIII. The parties mutually stipulate that each shall prepare, equip, and maintain in service on the coast of Africa a sufficient and adequate squadron or naval force of vessels of suitable numbers and descriptions, to carry in all not less than eighty guns, to enforce separately and respectively, the laws, rights, and obligations of each of the two countries for the suppression of the slave-trade, the said squadrons to be independent of each other, but the two Governments stipulating, nevertheless, to give such orders to the officers commanding their respective forces as shall enable them most effectively to act in concert and cooperation, upon mutual consultation, as exigencies may arise, for the attainment of the true object of this article, copies of all such orders to be communicated by each Government to the other, respectively. (8 U.S. Stat., p. 572.)

Detailed provisions for rendering this cooperation more effective were embodied in the treaty of 1862. A restricted right of search and detention in specified areas was reciprocally allowed and mixed courts for adjudication were established. The convention of 1870 provided for the discontinuance of the courts.

The general act signed at Brussels, July 2, 1890, by 17 states unified to a considerable extent the previous conventions relating to the slave trade and at the same time increased the number of states authorized to act as regards one another for the suppression of the traffic. A sort of clearing house was to be set up as an international office at Zanzibar. By this convention the scope of right of common action of the signatory states was much enlarged.

Colombia, 1885.—In 1884–85 there was an "unsettled state of affairs" in Colombia and owing to the "disordered condition of society" and the anticipated "disregard of the rights of foreigners on the coast and Isthmus," the American minister requested the presence of an "American man-of-war." Early in 1885 communication with the American minister was cut off by the disturbed conditions and the naval officer at Panama was obliged to act without communication with the diplomatic representative at Bogota. During the period of "disordered conditions", the forces of the United States took positive measures to protect the rights of American citizens.

Boxer uprising in China, 1900.—During the Boxer uprising in China in 1900 the United States maintained so far as possible a policy of independent action, though cooperating with the other Powers when it seemed essential. Regarding the sending by Mr. Conger, United States Minister to China, of an identic note to the Chinese Foreign Office, Mr. Hay, Secretary of State, wrote on March 22:

> In connection with the identic note agreed upon with your colleagues of France, Germany, and Great Britain, and sent by you

to the yamen on January 21 (inclosure 3, dispatch No. 316), while the Department finds no objection to the general terms of this paper [demanding publication of strong imperial decree without delay], it would have preferred if you had made separate representation on the question instead of the mode adopted, as the position of the United States in relation to China makes it expedient, that, while circumstances may sometimes require that it act on lines similar to those other treaty powers follow, it should do so singly and without the cooperation of other powers. (1900, Foreign Relations, U.S., p. 111.)

On June 7, however, Mr. Conger communicated with Mr. Hay with regard to whether he should join the diplomatic corps if this body found it "necessary to demand special audience with Emperor", Mr. Hay replied:

Act independently in protection of American interests where practicable, and concurrently with representatives of other powers if necessity arise. (Ibid., p. 142–43.)

Mr. Conger on June 8 again suggested that he join the diplomatic corps in demanding "an audience with Emperor, the demand to be insisted upon, and to state to the Throne that unless Boxer war is immediately suppressed and order restored foreign powers will be compelled themselves to take measures to that end." To this suggestion Mr. Hay's reply was "Yes", but in a supplementary message the following day he added,

We have no policy in China except to protect with energy American interests, and especially American citizens and the legation. There must be nothing done which would commit us to future action inconsistent with your standing instructions. There must be no alliances. (Ibid.)

On July 3, in order to place before the world the position of the United States in regard to the restoration of order in China, Mr. Hay sent the following circular telegram to United States representatives in the legations of the principal powers with the instructions that the purport of this statement be communicated to the minister for foreign affairs. This telegram read:

In this critical posture of affairs in China it is deemed appropriate to define the attitude of the United States as far as present

circumstances permit this to be done. We adhere to the policy initiated by us in 1857, of peace with the Chinese nation, of furtherance of lawful commerce, and of protection of lives and property of our citizens by all means guaranteed under extraterritorial rights and by the law of nations. * * * The purpose of the President is, as it has been heretofore, to act concurrently with the other powers, first, in opening up communication with Pekin and rescuing American officials, missionaries, and other Americans who are in danger; secondly, in affording all possible protection everywhere in China to American life and property; thirdly, in guarding and protecting all legitimate American interests; and fourthly, in aiding to prevent a spread of the disorders to the other provinces of the Empire and a recurrence of such disasters. * * * (Ibid., p. 299.)

On the same day, Mr. Hay communicated to the French Chargé d'Affaires in Washington that "instructions have been telegraphed to the commander of the United States naval forces in Chinese waters to confer with his colleagues and report as to the force necessary to accomplish the ends now purposed and the proportionate force to be appropriately employed by the United States for their attainment in the general interest of the powers concerned." This was in response to the request of the French Government that there be a "concert of the powers, with a view to sending identical instructions to the commanding officers of their respective forces in the Pechili. * * *" (Ibid., pp. 318–319.)

Later in the same month the French Government, through the Chargé in Washington, suggested in a memorandum to the United States that "the Government of the Republic is disposed to confer with the powers in the precautions to be taken to prevent the shipment of arms which should be destined for China." A memorandum of the same date, July 20, 1900, issued by the Department of State indicates that the Secretary of State had given orders to the officers in the various departments concerned "to exercise the utmost vigilance to prevent the dispatch or the landing in China of any arms destined for improper use in that country, and had given direct orders to the consuls of the United States

in China to do all in their power in the same direction." (Ibid., p. 319.)

In August conditions in China being in no way improved, it was suggested to the United States through its Embassy, that the German Government would like to know the views of the United States Government in regard to placing the American forces under the chief command of Field Marshal Count Waldersee in Chihli, and it was stated that Japan and Russia had already agreed to such an arrangement. The memorandum of the Department of State on this matter was transmitted to the German Foreign Office on August 10. It read:

> The Government of the United States will be much gratified to secure the command of so distinguished and experienced an officer as Count Waldersee for any combined military operations in which the American troops take part after the arrival of that officer in China to attain the purposes declared by this Government in the circular note delivered to the powers under date of July 3.
>
> The general commanding the American forces in China has already been authorized to agree with other commanders as to a common official direction of the various forces in their combined operations, preserving the integrity of his American division as a separate organization. A copy of this communication will be transmitted to him.
>
> As a considerable time must elapse before Count Waldersee can reach China and conditions are rapidly changing, it would seem desirable to leave questions of method to be determined in view of the conditions which may then exist. The suggestion of His Majesty the German Emperor that one or more military officers of each nationality should be attached to the headquarters of Count Waldersee to maintain communications with the national contingent meets the approval of this Government. (Ibid., p. 331.)

Swedish proposition, 1916.—In 1916 the Swedish Minister in London made known in a memorandum to Colonel House the Swedish desire for—

> An effective collaboration with other neutral powers in view of conventional and idealistic interests. The Government, who are sincerely pacific, have been compelled to recognize that the difficulties must increase with the extension of the fight, and

that the possibilities for neutral interests to assert themselves evidently decrease in the same proportion as the circle of neutrals becomes narrowed down through the entry in the struggle of new powers.

The Government are convinced that it would prove a great and irreparable damage if the voice of neutrals could not make itself heard with sufficient weight. With regard to this, the Government do not only think of the difficulties and losses inflicted upon one or the other of neutral countries through undue interference from the belligerents, inconveniences which might have been avoided through a unanimous action of the interested neutral states.

The Swedish Government consider it as the precious duty and the inalienable right of all sincerely neutral countries to intervene with impartiality and firmness against every attempt, whenceever they come, to render non-valid and void international rules, which are the fruit of centuries of experience and work. By preserving the inheritance of the law of nations, a service is indeed also rendered to the belligerents themselves, who under altered circumstances may one day have bitterly to regret—also from practical point of view—the actions in which they now allow themselves to indulge in order to gain a casual and often doubtful advantage. (1916, Foreign Relations, U. S. Supplement part II, p. 689.)

Sweden had in 1914 joined with Denmark and Norway in an identic note (1914 Id., supplement, p. 360), with which the Netherlands agreed, addressed to the German, French, British, and Russian ministers and protesting against the infringement of the rights of neutrals, and upholding the inviolability of the fundamental rules of international law.

A later communication in a circular telegram to the American diplomatic officers in Europe stated that it was considered inadvisable by the American Government to participate in a conference of neutrals. The geographical remoteness, the failure to include other American republics in the invitation, and the policy of independent action, were given as reasons for the decision.

Defence and restraint.—In some form physical restraint upon the action of man against man has been common from earliest times. The delegation to special

persons of the exercise of this restraint upon the action of one man or a group of men against another man or group of men has gradually grown up as men have united in larger and more unified groups. While at certain stages of civilization, the group itself might mobilize for defense as in early American settlements, at other stages as in modern European states special classes are trained to defend the group with highly technical means. It seemed but a natural development from national to international defense or restraint. International guaranties of security were proposed and sometimes embodied in agreements or treaties. The experience of the nineteenth and early twentieth century has not confirmed the one time belief in the efficacy of such methods.

As states assumed the protection of those subject to their authority, various measures were resorted to to assure the respect for this protection and for the rights claimed for their subjects. Reprisals in some form were approved among early states and quite fully developed in Roman practice and during the Middle Ages. Letters of marque and reprisal and privateering gave evidence of the survival of early methods. Sequestration of public or private property of an offending state or of its nationals, breaking off of official or other relations, expulsion or arrest of nationals, occupation of ports or territory of the offending state, or other measures might be taken in time of strained relations between states. Embargo and nonintercourse acts did put a degree of restraint upon offenders but not always to the anticipated degree. Pacific blockade, retorsion, and other measures short of war were from time to time tried with varying degree of success. The belief became more and more general in the twentieth century, particularly after the Hague Conference of 1899, that concerted action and international agreements would assure an orderly world.

Severally and jointly.—When a group has agreed severally and jointly not merely is the group under obliga-

tion to act to secure the end for which the agreement is made, but each member is under an independent obligation to act. There is not the same obligation to act, however, when a state simply declares its intention to act in a certain manner or to follow a named policy, for its policy may from time to time change as probably was the case when it made the declaration. A declaration, being unilateral, rests upon the state making the declaration, and the use of its forces will depend upon the conditions under which the declaration is made. An agreement, however, has a binding force which implies that other powers as well as the parties to the agreement may expect the terms of the agreement to be fulfilled, though, of course, the agreement does not make unlawful action lawful. Even if many states make identic declarations, this fact does not prevent one of the states from renouncing the position taken in the declaration.

As states A, B, and C have severally and jointly agreed to the boycott of X and Y, the action of one in the boycott is the action of all. The action of each should therefore be that which would most effectively realize the ends for which the boycott was undertaken. The ports of each should be open, so far as the conduct of the boycott is concerned, on the same terms to vessels of all and the conduct of port authorities and other officials should as regards the boycott be similar.

Solution III

(*a*) The *Ajax* should determine for what port the *Banner* is bound, and if for a port of X or if uncertain, should send the *Banner* to the nearest port of A, B, or C.

If the *Banner* had sailed before the boycott was proclaimed, the *Banner* should be notified of the boycott and should be prohibited from entering any port of X.

The *Brook* should act in the same manner unless for special reasons the *Banner* should be sent to a port of B.

(*b*) The *Crown* should take such action as would make certain that the merchant vessel of X goes to a port of B or some port of A or C.

(*c*) The *Crown*, if assured of the nationality of the *Drone*, may take no action though the *Drone* may be kept from entering ports of X which are effectively closed.

(*d*) Merchant vessels of X or D, E, and F bound out from X under convoy of vessel of war of X are free to proceed but when bound for X the cruisers of states A, B and C may take action to prevent entrance of the vessels to ports which are effectively closed and may route or take vessels of X bound for X to ports of A, B, and C.

INDEX

3628—34——10

○